Convening and Conduct of Meetings of Committee of Creditors

Lesson 18

KEY CONCEPTS

■ Claim ■ Financial Creditor ■ Related Party ■ Financial Sector Regulator ■ Voting Share ■ Committee of Creditors ■ Types of Committees of Creditors ■ Authorised Representaive

Learning Objectives

To understand:

- Committee of Creditors
- Meetings of Committee of Creditors
- Representation of the Financial Creditors
- Video conferencing or other audio and visual means
- Voting and Approval by the Committee
- Commercial Wisdom of Committee of Creditors

Lesson Outline

- Introduction
- Meeting of Committee of Creditors
- Right of Committee of Creditors to replace Resolution Professional
- Approval of Resolution Plan by Committee of Creditors
- Application to extend time period of Corporate Insolvency Resolution Process
- Commercial wisdom of committee of creditors
- Role and Responsibilities of Authorised Representative of financial creditor
- Case Law
- Lesson Round-Up
- Test Yourself
- References

REGULATORY FRAMEWORK

- The Insolvency and Bankruptcy Code,2016
- The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

INTRODUCTION

The Banking Law Reforms Committee (BLRC) has laid special emphasis upon the "rights of creditors" under the Code. In its 2015 Report, the BLRC has stated the following;

> *"... When default takes place, control is supposed to transfer to the creditors; equity owners have no say."*

The BLRC thus recognized the positional weakness of creditors under the prevalent bankruptcy regime, and thus developed a "creditor-in-control" model under the Code. According to this model, the management of the corporate debtor's affairs shall vest absolutely in the hands of the creditors in the event of financial distress. Likewise, the Hon'ble Supreme Court, *in Innoventive Industries v. Union of India*, upheld the intention of the BLRC and observed that;

> *"... the most significant change being, that when a company defaults on its debt, control of the company should shift to creditors rather than the management who was retaining control after the default."*

The committee of creditors is the most important business decision-making body in every corporate insolvency resolution process. It exercises its commercial wisdom and plays a fundamental role in the turnaround and restructuring of the corporate debtor within the timelines set down by the IBC. Most importantly, the Committee of Creditors is vested with the responsibility to assess the viability of the Corporate Debtor and determine the manner in which its distress is to be resolved.

The Committee of Creditors is uniquely positioned to support and facilitate the discharge of duties by the Resolution Professional. Members of the Committee of Creditors support and help the Resolution Professional in maximizing the value of the assets of the Corporate Debtor by discharging their own duties with alacrity.

In ***Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal and Others [(2019) SCC Online SC 1479]***, the Supreme Court observed that-

The Interim Resolution Professional selected by the NCLT has to constitute a Committee of Creditors comprising all the financial creditors of the corporate debtor. This provision is aimed at creditors adopting a collective approach toward insolvency resolution instead of proceeding individually. Key decisions of the process and the resolution plan are approved by the Committee of Creditors if it is satisfied that the provisions of the most acceptable plan would ensure that their dues are cleared.

The creditor-in-control approach of the corporate insolvency resolution process (CIRP) while strengthening the creditors' rights puts the financial creditors (FCs) in a unique position visà-vis other stakeholder. The FCs are decision makers, the decisions, however, are ought to be made representing interest of all other stakeholders and are not on the basis of their own qualified interests. The Code hence places them in a position of 'trust' and hence the power vested in the CoC has to be exercised with caution, reason and fairness. The CoC is a creation of statute (Numetal Ltd. v. Satish Kumar Gupta & Anr.) Its powers and duties are provided in the Code making it a statutory institution and it discharges a public function. It is designed (and expected to act) as a responsible, empowered and accountable institution and shall not be guided by anti-common interests.

The significance of creditor is apparent from the fact that the corporate insolvency resolution process under the Code can be initiated by a creditor (financial or operational). Section 18(c) of the Code states that it is mandatory for Interim Resolution Professional to constitute Committee of Creditors i.e. the Interim Resolution Professional shall........... (c) constitute a committee of creditors; It is further provided in sub-section (d) that Interim Resolution Professional shall monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors.

All decisions during CIRP from appointment of Resolution professional to actions required to run the corporate debtor as a going concern and achieve objective of maximization of value as envisaged in Preamble of Code are vested in the Committee of Creditors from the first day of its meeting. Section 12A of the Code provides for withdrawal of application admitted under section 7, 9 or 10 subject to approval of Committee of Creditors by 90% voting. It provides that the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.

The committee of creditors is composed of financial creditors of the corporate debtor as the financial creditors have the capability to assess the commercial viability of the corporate debtor and are willing to modify the terms of the debt contracts in negotiations between the creditors and the corporate debtor.

Operational creditors, on the other hand, are not equipped to decide on matters relating to commercial viability of the corporate debtor, nor are they generally willing to take the risk of restructuring their debts in order to ensure the management of operations of corporate debtor a going concern.

Hon'ble Supreme Court has in the matter of ***Swiss Ribbon Pvt. Ltd. & Anr. Vs. Union of India & Ors. (date of judgment 25.01.2019)*** held that the classification under IBC between financial creditors and operational creditors is based on an intelligible criteria and is neither discriminatory nor arbitratory nor violative of Article 14 of Constitution of India;

The Code clearly details the duties of CoC without ambiguity. Given the complex and dynamic nature of businesses, the role of CoC is a difficult one. However, the Code has empowered the CoC with the services of a capable and trained Resolution Professional (RP) to conduct the process under its guidance. The role of the CoC in helping keep the corporate debtor as a going concern and in assessing viability of the business is crucial to the entire insolvency process in search of liquidation remote solutions. The CoC is at a vantage position to decide on meeting the needs of the company to remain as a going concern including raising interim finance. The CoC also decides on what and how expenses are to be made and approve the process cost. It also decides the professional fees for the services of the Insolvency Professional (IP) it chooses to conduct the process. In addition, the CoC makes the decision to retain or replace the Insolvency Professional. Assessing viability of the business is done by the CoC at two levels; one an ex-post analysis of financial position of the debtor's business when the insolvency proceeding is initiated, to understand the reasons for insolvency; and two an ex-ante evaluation of the feasibility and viability of a resolution plan in addressing the cause of insolvency and putting the CD back in business in a sustainable manner. Such assessment forms the basis for the identification of criteria that prospective resolution applicants (RAs) have to meet and construction of the evaluation matrix on which resolution plans are evaluated. The CoC carries out its functions through its meetings and these meetings are a sacred ritual. Recognising the need for sanctity of these meetings, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) provides, in detail, the manner in which these have to be conducted.

Important Definitions

Creditor means any person to whom a debt is owed and includes

- a financial creditor,
- an operational creditor,
- a secured creditor,
- an unsecured creditor; and
- a decree-holder {section 3 (10)}

Section 3 (30) "secured creditor" means a creditor in favour of whom security interest is created;

Section 5(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

Section 5 (20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Section 3(11) of the Code defines "debt" which means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

"Operational Debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority; { Section 5(21)}

"Financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money. {Section 5 (8)}

Section 5 (8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

Home Buyers to be considered as ......Financial Creditors

The Supreme Court in the case of ***Pioneer Urban Land & Infrastructure Ltd. & Anr. vs. Union of India & Ors.,*** *upheld the* constitutional validity of the introduction of home buyers as "financial creditors" to the IBC, made by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, enabling home buyers to trigger IBC against the real estate developer.

Claim

Section 21 of the Code states that the Interim Resolution Professional shall constitute a committee of creditors after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor. Section 18 of the Code enumerates mandatory duties of the Interim Resolution Professional which include that the Interim Resolution Professional shall receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15; and constitute a committee of creditors; So, claim is the first step to be determined to constitute committee of creditors.

Claim is defined in section 3(6) of the Code as

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecure.

The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides procedure for holding first meeting of Committee of Creditors as follows:

An insolvency professional shall make a public announcement immediately on his appointment as an interim resolution professional (IRP) i.e. within three days of his appointment. {Regulation 6(1)}

The public announcement shall state where claim forms can be downloaded or obtained from, as the case may be, provide the last date for submission of proofs of claim, which shall be fourteen days from the date of appointment of the interim resolution professional. {Regulation 6(2)}

The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it. {(Regulation 13(1))}

The interim resolution professional shall file a report certifying constitution of the committee to the Adjudicating Authority within two days of the verification of claims received under subregulation (1) of regulation 12.. {Regulation 17(1)}

The interim resolution professional shall hold the first meeting of the committee within seven days of filing the report under this regulation. {Regulation 17(2)}

Committee of Creditors

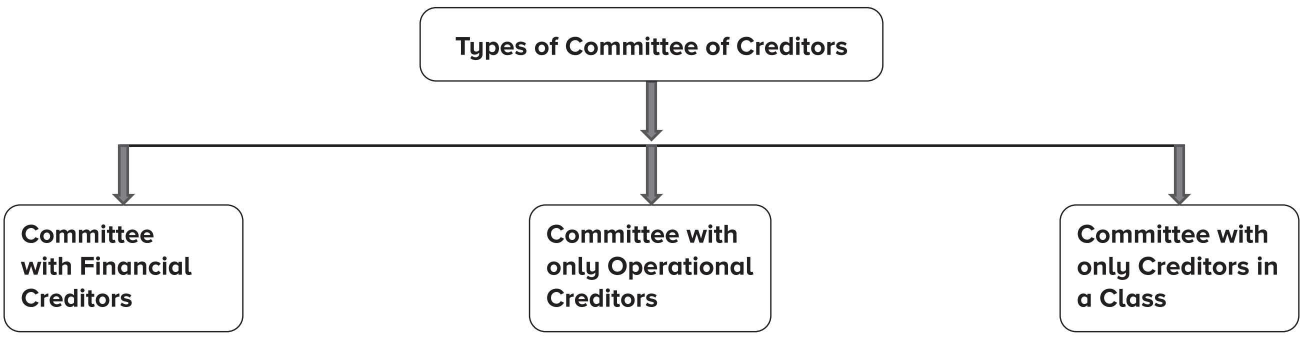
Regulation 2 (1) (d) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 defines "committee" which means a committee of creditors established under section 21;

Who shall constitute Committee of Creditors (CoC)

(i) The Interim Resolution Professional shall constitute a committee of creditors after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor. (Section 21(1)).

(ii) Regulation 13 of the IBBI (Corporate Insolvency Resolution Process) Regulations states that the Interim Resolution Professional or the Resolution Professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it. The list of creditors shall be presented at the first meeting of Committee of Creditors.

Composition of Committee of Creditors



- The committee of creditors shall comprise all financial creditors of the corporate debtor. (Section 21(2))
- Both secured and unsecured financial creditors are members of Committee of Creditors.

Composition of Committee of Creditors where there is no financial creditor.

- It is provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified. (Section 21(8)).
- **Committee with only operational creditors (Regulation 16 of the IBBI (Corporate Insolvency Resolution Process) Regulations, 2016):** Regulation 16 provides that where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall consist of members as under –

  (a) eighteen largest operational creditors by value:
  Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors,

  (b) one representative elected by all workmen other than those workmen included under subclause (a); and

(c) one representative elected by all employee other than those employee included under subclause (a).

Status of Financial Creditor, if related party to the Corporate Debtor: First proviso to section 21(2) provides that a financial creditor or the authorised representative of the financial creditor, if it is a related party of the corporate debtor, shall not have any **right of representation, participation or voting** in a meeting of the committee of creditors.

- **Committee with only creditors in a class** (**Regulation 16B of the the IBBI (Corporate Insolvency Resolution Process) Regulations,2016):** Where the corporate debtor has only creditors in a class and no other financial creditor eligible to join the committee, the committee shall consist of only the authorised representative(s).

According to section 5(24), a **"related party",** in relation to a corporate debtor, means-

(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

(b) key managerial personnel of the corporate debtor or a relative of key managerial personnel of the corporate debtor;

(c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;

(d) a private company in which a director, partner or manager of the corporate debtor is a director and holds alongwith his relatives, more than two per cent of its share capital;

(e) a public company in which a director, partner or manager of the corporate debtor is a director and holds alongwith relatives, more than two per cent of its paid-up share capital;

(f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;

(k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(m) any person who is associated with the corporate debtor on account of-

(i) participation in policy making processes of the corporate debtor; or

(ii) having more than two directors in common between the corporate debtor and such person; or

(iii) interchange of managerial personnel between the corporate debtor and such person; or

(iv) provision of essential technical information to, or from, the corporate debtor.

In the matter of *'Phoenix Arc Private Limited Vs. Spade Financial Services Limited & Ors.',* the Supreme Court elucidates the two way relationship in related parties that *"The definition describes a commutative relationship, meaning that X can be a related party of Y, if either X is related to Y, or Y is related to X. The definition of 'related party' under the IBC is significantly broad. The intention of the legislature in adopting such a broad definition was to capture all kinds of inter-relationships between the financial creditor and the corporate debtor."*

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 also added second proviso to section 21(2) which clarified that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into **equity shares** or instruments convertible into equity shares, or completion of such transactions as may be prescribed, **prior to the insolvency commencement date**. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 added the words "or completion of such transactions as may be prescribed" in the said section, thus, widening the condition in which a financial creditor would not be considered to be a related party.

According to section 3(18) of the Code, a **"financial sector regulator"** means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government.

Whether the relatedness of the related party could merely have existed in the past or whether they must continue in *praesenti* i.e. at the present time?

The Supreme Court in the matter of ***'Phoenix Arc Private Limited Vs. Spade Financial Services Limited & Ors.',*** clarified that while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in *praesenti* would be debarred from the Committee, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being coveredby the exclusion thereunder. Thus, relatedness of related parties at the present time would be considered for exclusion from the Committee, in addition, any parties that were related in the past and cease to be related parties at present in order to become a member of the Comimittee must also be considered for exclusion from the Committee.

Representation of the Financial Creditor

1. **Consortium:** Section 21(6) of the Code provides

Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may-	(a)	authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;
	(b)	represent himself in the committee of creditors to the extent of his voting share;
	(c)	appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or
	(d)	exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

2. **Class of Creditors (Section 21(6A):** To address the challenges of representing certain types of FCs. The section envisages three types of representatives for FCs:

Where a financial debt	*Authorised Representative to act on behalf of financial creditors:*
(a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors,	such trustee or agent shall act on behalf of such financial creditors;
(b) If a financial debt is owed to a class of creditors exceeding a specified number (other than that described above, or covered under section 21(6)), the Interim Resolution Professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the Interim Resolution Professional, to act as their authorised representative	Such Authorised representative shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;
(c) is represented by a guardian, executor or administrator,	such person shall act as authorised representative on behalf of such financial creditors.

Such AR shall attend the meetings of the Committee of Creditors and vote on behalf of each financial creditor to the extent of his voting share. The remuneration payable to the authorised representative-

(i) under clauses (a) and (c) of sub-section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(ii) under clause (b) of sub-section (6A) shall be as specified which shall be form part of the insolvency resolution process costs. (Section 21(6B)).

3. *Appointment of Authorised Representative by individual creditor* {Section 24(5)}*:* Subject to sub-sections (6), (6A) and (6B) of section 21, any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors along with responsibility of paying fee to such insolvency professional.

Role and Responsibilities of Authorised Representatives (AR)

ARs are the agents/trustees of the creditors/class of creditors they represent and must act in accordance with their instructions. The role, responsibilities, and rights of the AR (under section 21(6), section 21(6A), or section 24(5)) are set out in section 25A of the IBC, which was inserted by way of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.

(i) *Section 25A provides that authorized representative shall have*

- the right to participate and vote in meetings of the Committee of Creditors on behalf of the financial creditors he represents in accordance with the prior voting instructions of such financial creditors obtained through physical or electronic means;
- the duty to circulate the agenda and minutes of the Committee of Creditors meeting to the financial creditors he represents;
- the duty to not act against the interests of the financial creditors he represents and always act in accordance with their prior instructions;
- the duty to file with the Committee of Creditors any voting instructions received by way of physical or electronic means from the financial creditors he represents;

- the duty to ensure that the appropriate voting instructions of the financial creditors he represents are correctly recorded by the Interim Resolution Professional or Resolution Professional.

(ii) *Regulation 16A of the IBBI (Corporate Insolvency Resolution Process) Regulations,2016):* Regulation 16A provides for selection, duties and rights of Authorised Representative as follows:

(1) *Selection of Authorised Representative:* The Interim Resolution Professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received with proof, on or before the last date mentioned in the public announcement, to act as the authorised representative of the creditors of the respective class.

Provided that the choice of an insolvency professional to act as an authorised representative by a financial creditor in a class in Form CA shall not be considered, if the Form CA is received after the time stipulated in the public announcement.

(2) *Application to AA for appointment of Authorised Representative:* The Interim Resolution Professional shall apply to the Adjudicating Authority for appointment of the authorised representatives selected under sub-regulation (1) within two days of the verification of claims received under sub-regulation (1) of regulation 12.

Provided that till the application for appointment of the authorised representative for a class of creditors is under consideration before the Adjudicating Authority, the insolvency professional selected under sub-regulation (1) shall act as an interim representative for such class of creditors, and shall be entitled to attend the meetings of the committee and shall have such rights and duties as that of an authorised representative.

(3) *Delay in appointment of authorised representative:* Any delay in appointment of the authorised representative for any class of creditors shall not affect the validity of any decision taken by the committee.

(3A) *Replacement of AR (Regulation (3A):* The financial creditors in the class, representing not less than ten per cent. voting share may seek replacement of the authorised representative with an insolvency professional of their choice by making a request to the interim resolution professional or resolution professional who shall circulate such request to the creditors in that class and announce a voting window open for at least twenty-four hours.

(4) *Information and means of communication to be provided to Authorised Representative:*

- The Interim Resolution Professional shall provide the list of creditors in each class to the respective authorised representative appointed by the Adjudicating Authority.
- The Interim Resolution Professional or the resolution professional, as the case may be, shall provide an updated list of creditors in each class to the respective authorised representative as and when the list is updated.

  Clarification: The authorised representative shall have no role in receipt or verification of claims of creditors of the class he represents.
- The Interim Resolution Professional or the resolution professional, as the case may be, shall provide electronic means of communication between the authorised representative and the creditors in the class.

(5) *Voting share of a creditor in a class:*

The voting share of a creditor in a class shall be in proportion to the financial debt which includes an **interest at the rate of eight per cent per annum** unless a different rate has been agreed to between the parties.

(6) *Fee payable to Authorised Representative:*

- The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in the following manner, namely: -

Number of creditors in the class	Fee per meeting of the committee (Rs.)
10-100	30,000
101-1000	40,000
More than 1000	50,000

The authorised representative shall be entitled to receive fee for every meeting of the class of creditors convened by him in the following manner, namely: -

Number of creditors in the class	Fee per meeting of creditors in class with authorised representative (Rs.)
10-100	10,000
101-1000	12,000
More than 1000	15,000

Fee of AR to be part of IRP cost: The payment of fee to authorised representative shall be part of insolvency resolution process cost in respect of two meeting with the creditors he represents corresponding to a meeting of the committee of creditors.

Approval of fee of AR: The fee for any additional meeting beyond two meetings corresponding to a meeting of the committee of creditors shall be part of insolvency resolution process cost subject to approval of committee of creditors.

(7) *Duty of Authorised Representative:*

- The authorised representative shall circulate the agenda to creditors in a class, and may seek their preliminary views on any item in the agenda to enable him to effectively participate in the meeting of the committee.
- The creditors shall have a time window of at least twelve hours to submit their preliminary views, and the said window opens at least twenty-four hours after the authorised representative seeks preliminary views.
- Such preliminary views shall not be considered as voting instructions by the creditors.

(8) The duties of Authorised Representative shall : -

(a) assist the creditors in a class he represents in understanding the discussions and considerations of the committee meetings and facilitate informed decision-making;

(b) review the contents of minutes prepared by the resolution professional and provide his comments to the resolution professional, if any;

(c) help the creditors in a class he represents during the consultations made by the resolution professional to prepare a strategy for marketing of the assets of the corporate debtor in terms of sub-regulation (1) of regulation 36C

(d) work in collaboration with the creditors in a class he represents to enhance the marketability of the assets of the corporate debtor in terms of sub-regulation (3) of regulation 36C;

(e) assist the creditors in a class he represents in evaluating the resolution plans submitted by resolution applicants;

(f) ensure that the creditors in a class he represents have access to any information or documents required to form an opinion on issues discussed in the committee meetings;

(g) update regularly the creditors in a class he represents on the progress of the corporate insolvency resolution process;

(h) make suggestions for modifications of the resolution plan as may be required by the creditors in class he represents;

(i) record proceedings and prepare the minutes of the meeting with the creditors in a class he represents; (The provisions regarding minutes of meetings in this regulation shall apply mutatis mutandis to class meetings) and

(j) act as a representative for the creditors in a class he represents in representations before the Adjudicating Authority, National Company Law Appellate Tribunal, and other regulatory authorities.

The creditors in a class may propose any additional responsibility upon the authorised representative in relation to the representation of their interest in the committee.

Appointment of Facilitators

Regulation 16C of the CIRP Regulations provides that where the number of creditors in a class exceeds one thousand, the committee may, direct the interim resolution professional or resolution professional, as the case may be, to appoint an insolvency professional other than the interim resolution professional, resolution professional and authorised representative, or any other person, as facilitator for a sub-class within the creditors in a class, subject to the following conditions: -

(a) the appointment of facilitator shall be considered only if, after the first meeting of the committee, a sub-class comprising of at least one hundred creditors out of the total number of creditors in a class, request for the inclusion of an agenda for such appointment along with the name of the proposed facilitator;

(b) the total number of facilitators shall not exceed five; and

(c) the fee for facilitator for each sub-class shall be twenty per cent. of the fees specified for the authorised representative and such fee shall be part of the insolvency resolution process cost.

The committee may replace the facilitator on the recommendation of a majority of the members of the sub-class.

Roles and Responsibilities of the Facilitator

Regulation 16D of the CIRP Regulations states that the roles and responsibilities of the facilitator(s) shall include the following: -

(a) facilitating communication between the authorised representative and the creditors of the sub-class;

(b) attending the meetings of the committee, as observers, to facilitate communication between creditors of the respective sub-class;

(c) providing information and clarifications to the creditors in a sub-class about the insolvency resolution process, as per advice of the authorised representative; and

(d) any other tasks assigned by the committee to improve representation and communication.

Meeting of Committee of Creditors

Section 24 of the Code along with the IBBI ((Insolvency Resolution Process for Corporate Persons) Regulations, 2016 lays down legal provisions w.r.t. conduct of the meeting of the Committee of Creditors as follows:

First Meeting of Committee of Creditors: The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors by Interim Resolution Professional.

Place of meeting of Committee of Creditors: The members of the committee of creditors may meet in person or by such electronic means as may be specified. (Section 24 (1))

Who shall conduct meeting of the Committee of Creditors:

- All meetings of the committee of creditors shall be conducted by the resolution professional. (Section 24 (2)).
- Regulation 18 provides for meetings of the committee (Corporate Insolvency Resolution Process Regulations,2016):

  1. A resolution professional shall convene a meeting of the committee before lapse of thirty days from the last meeting. It is provided that the committee may decide to extend the interval between such meetings subject to the condition that there shall be at least one meeting in each quarter.
  2. A resolution professional may convene a meeting of the committee as and when he considers necessary.
  3. A resolution professional may convene a meeting, if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing at least thirty three per cent of the voting rights.

     It is further explained that for the purposes of sub- regulation (2) it is clarified that meeting (s) may be convened under this sub-regulation till the resolution plan is approved under sub-section (1) of section 31 or order for liquidation is passed under section 33 and decide on matters which do not affect the resolution plan submitted before the Adjudicating Authority.
  4. A resolution professional may place a proposal received from members of the committee in a meeting, if he considers it necessary and shall place the proposal if the same is made by members of the committee representing at least thirty three per cent of the voting rights.
  5. Where the corporate debtor has any real estate project, the committee may direct the resolution professional to invite the 'competent authority' as defined in clause (p) of section 2 of the Real Estate (Regulation and Development) Act, 2016 related to such project to attend such meeting(s) of the committee, as the committee may decide, without voting rights, for providing inputs on matters associated with the development of such project.

Notice of meeting of Committee of Creditors

(i) To whom notice is to be served:

- Section 24(3) provides that the resolution professional shall give notice of each meeting of the committee of creditors to-

  (a) members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5);

  (b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

  (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.
- Section 24(4) provides that while the directors, partners, and one representative of the OC, as referred to in subsection (3), may attend the meetings of the committee of creditors, they shall not have any right to vote in such meetings. In addition, their absence shall not invalidate the proceedings of the meetings.

CASE LAWS

In ***Vijay Kumar Jain Vs. Standard Chartered Bank & Others [(2019) SCC Online SC 103],*** the Supreme Court held that resolution plans need to be provided to members of the suspended board of directors of the corporate debtor, as they have a right to participate in the meetings of the committee of creditors. It was observed that a combined reading of the IBC and the Corporate Insolvency Resolution Process Regulations leads to the conclusion that members of the suspended board of directors, being vitally interested in resolution plans that may be discussed at meetings of the committee of creditors, must be given a copy of such plans as part of the documents that have to be furnished along with the notice of such meetings.

In ***Consolidated Engineering Company & Another Vs. Golden Jubilee Hotels Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 501 of 2018],*** the NCLAT held that the AA has rightly held that 10 percent of total debt for the purpose of representation in the committee of creditors is to be calculated on the basis of the claim as collated and noticed by the RP. It cannot be based on the amount claimed by all the operational creditors until it is verified and compared. If the claim of operational creditors on verification is found to be less than 10 percent, the operational creditors have no right to claim representation in the meeting of the committee of creditors.

(ii) Notice period:

Regulation 19 of the Corporate Insolvency Resolution Process Regulations provide for notice period of meeting of committee of creditors as follows:

- *Minimum 5 days' notice period***:** Subject to this Regulation, a meeting of the committee shall be called by giving not less than five days' notice in writing to every participant, at the address it has provided to the Interim Resolution Professional or the resolution professional, as the case may be, and such notice may be sent by hand delivery, or by post but in any event, be served on every participant by electronic means in accordance with Regulation 20.
- *Notice period of 24 hrs/48 hrs:* The committee may reduce the notice period from five days to such other period of not less than twenty-four hours, as it deems fit. It is provided that the committee may reduce the period to such other period of not less than forty-eight hours if there is any authorised representative.

"Participant" means a person entitled to attend a meeting of the committee under section 24 or any other person authorised by the committee to attend the meeting; (Regulation 2(1) (l) of Corporate Insolvency Resolution Process Regulations)

(iii) Service of notice by electronic means

Regulation 20 of the Corporate Insolvency Resolution Process Regulations states: -

- A notice by electronic means may be sent to the participants through e-mail as a text or as an attachment to e-mail or as a notification providing electronic link or Uniform Resource Locator for accessing such notice.
- The subject line in e-mail shall state the name of the corporate debtor, the place, if any, the time and the date on which the meeting is scheduled.
- If notice is sent in the form of a non-editable attachment to an e-mail, such attachment shall be in the Portable Document Format or in a non-editable format together with a 'link or instructions' for recipient for downloading relevant version of the software.
- When notice or notifications of availability of notice are sent by an e-mail, the resolution professional shall ensure that it uses a system which produces confirmation of the total number of recipients e-mailed and a record of each recipient to whom the notice has been sent and copy of such record and any notices of any failed transmissions and subsequent re-sending shall be retained as "proof of sending".

- The obligation of the resolution professional shall be satisfied when he transmits the e-mail and he shall not be held responsible for a failure in transmission beyond its control.
- The notice made available on the electronic link or Uniform Resource Locator shall be readable, and the recipient should be able to obtain and retain copies and the resolution professional shall give the complete Uniform Resource Locator or address of the website and full details of how to access the document or information.
- If a participant, other than a member of the committee, fails to provide or update the relevant e-mail address to the resolution professional, the non-receipt of such notice by such participant of any meeting shall not invalidate the decisions taken at such meeting.

(iv) Contents of the notice for meeting.

Regulation 21 of Corporate Insolvency Resolution Process Regulations provides for the content of notice of meeting of Committee of Creditors as follows:

(1) The notice shall inform the participants of the venue, the time and date of the meeting and of the option available to them to participate through video conferencing or other audio and visual means, and shall also provide all the necessary information to enable participation through video conferencing or other audio and visual means.

(2) The notice of the meeting shall provide that a participant may attend and vote in the meeting either in person or through an authorised representative. It is provided that such participant shall inform the resolution professional, in advance of the meeting, of the identity of the authorised representative who will attend and vote at the meeting on its behalf.

> "Video conferencing or other audio and visual means" means such audio and visual facility which enables the participants in a meeting to communicate concurrently with one another and to participate effectively in the meeting. (Regulation 2(1) (p) of Corporate Insolvency Resolution Process Regulations)

(3) The notice of the meeting shall contain the following	(i)	a list of the matters to be discussed at the meeting;
	(ii)	a list of the issues to be voted upon at the meeting; and
	(iii)	copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting.
(4) The notice of the meeting shall-	a)	state the process and manner for voting by electronic means and the time schedule, including the time period during which the votes may be cast:
	b)	provide the login ID and the details of a facility for generating password and for keeping security and casting of vote in a secure manner; and
	c)	provide contact details of the person who will address the queries connected with the electronic voting.

Quorum at the Meeting

Regulation 22 of the Corporate Insolvency Resolution Process Regulations states that

- *Quorum for the meeting:* A meeting of the committee shall be quorate if members of the committee representing at least thirty three percent of the voting rights are present either in person or by video conferencing or other audio and visual means. It is also provided that the committee may modify the percentage of voting rights required for quorum in respect of any future meetings of the committee.
- *Meeting adjourned for want of quorum:* Where a meeting of the committee could not be held for want of quorum, unless the committee has previously decided otherwise, the meeting shall automatically stand adjourned at the same time and place on the next day.

- *Quorum at the adjourned meeting:* In the event a meeting of the committee is adjourned for want of quorum, the adjourned meeting shall quorate with the members of the committee attending the meeting.

Participation through Video Conferencing

Regulation 23 of Corporate Insolvency Resolution Process Regulations provides for participation of the members of Committee of Creditors through video conferencing by laying down essentials of contents of notice and duties of RP in this regard as follows:

(i) *Notice to provide option to attend meeting through video conferencing:* The notice convening the meetings of the committee shall provide the participants an option to attend the meeting through video conferencing or other audio and visual means in accordance with this Regulation.

(ii) *Duties of the Resolution Professional:*

- The resolution professional shall make necessary arrangements to ensure uninterrupted and clear video or audio and visual connection.
- The resolution professional shall take due and reasonable care:
  (a) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;
  (b) to ensure availability of proper video conferencing or other audio and visual equipment or facilities for providing transmission of the communications for effective participation of the participants at the meeting;
  (c) to record proceedings and prepare the minutes of the meeting;
  (d) to store for safekeeping and marking the physical recording(s) or other electronic recording mechanism as part of the records of the corporate debtor;
  (e) to ensure that no person other than the intended participants attends or has access to the proceedings of the meeting through video conferencing or other audio and visual means; and
  (f) to ensure that participants attending the meeting through audio and visual means are able to hear and see, if applicable, the other participants clearly during the course of the meeting. It is provided that the persons, who are differently abled, may make request to the resolution professional to allow a person to accompany him at the meeting.

(iii) *Deemed Venue of the meeting:* Where a meeting is conducted through video conferencing or other audio and visual means, the scheduled venue of the meeting as set forth in the notice convening the meeting, which shall be in India, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.

Conduct of the Meetings

Regulation 24 of the Corporate Insolvency Resolution Process Regulations states that

- *Chairman of the meeting: T*he resolution professional shall act as the chairman of the committee of creditors' meeting.
- *Attendance at the commencement of the meeting:*

At the commencement of a meeting, the resolution professional shall take a roll call when every participant attending through video conferencing or other audio and visual means shall state, for the record, the following,-	(a) his name;
	(b) whether he is attending in the capacity of a member of the committee or any other participant;
	(c) whether he is representing a member or group of members;
	(d) the location from where he is participating;
	(e) that he has received the agenda and all the relevant material for the meeting; and
	(f) that no one other than him is attending or has access to the proceedings of the meeting at the location of that person.

- *Confirmation of quorum:* After the roll call, the resolution professional shall inform the participants of the names of all persons who are present for the meeting and confirm if the required quorum is complete.
- *Quorum throughout the meeting:* The resolution professional shall ensure that the required quorum is present throughout the meeting.
- *Restricted access to the meeting:* From the commencement of the meeting till its conclusion, no person other than the participants and any other person whose presence is required by the resolution professional shall be allowed access to the place where meeting is held or to the video conferencing or other audio and visual facility, without the permission of the resolution professional.

Voting by the Committee

The Committee of Creditors as a collective body takes decisions by members voting on a particular item/matter. Each member of the Committee of Creditors has a voting share in the Committee of Creditors. Voting by the Committee is governed by the following provisions:

(i) *Voting right of creditor in Committee of Creditors:* Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor. [Section 24 (6)]

Section 5 (28) "voting share" means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor.

(ii) *Who shall determine voting right:* The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board. [Section 24 (7)].

Voting share in case of joint/consortium Loan: Subject to sub-sections (6) and (6A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them. [Section 21(3)]

Same person is operational as well as financial creditor: Where any person is a financial creditor as well as an operational creditor, - (a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor; (b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor. [Section 21(4)]

Assignment of operational debt to financial creditor: Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer. [Section 21(5)]

*Right to attend meeting of committee of creditors but not vote***:** Following persons have only right to attend meeting of committee of creditors but not vote:

(a) Section 24 (4)	The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings.	It is also provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(b) First proviso of Section 21(2)	a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:	It is further provided that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.

Voting by Authorised Representative

As far as voting by an authorised representative is concerned, section 25A(3) provides that if the authorised representative represents several financial creditors, he shall cast his vote on behalf of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share. If any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of these creditors.

However, the voting provision of creditors in a class is different from voting by other financial creditors. By the Insolvency and Bankruptcy Code (Amendment) Act, 2019, sub-clause 3A was inserted in section 25A to overcome a peculiar situation where the committee of creditors comprised a substantial number (or only) of creditors in a class (primarily home buyers). It was noticed that in these cases, the total voting share being polled by home buyers was very small (since they were scattered all over the country and not organized), thereby creating a deadlock in decision making as the requisite voting majorities were not being obtained. Hence, the newly inserted provision provides that an authorised representative under section 21(6A) (that is, an AR of creditors in a class) shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than 50 percent of the voting share of the financial creditors he represents who have cast their vote. Further, it is provided that for a vote to be cast in respect of a withdrawal application under section 12A of the IBC, the financial creditors shall cast his vote in accordance with the provisions of section 25A(3) of the IBC.

Voting Procedures

The voting procedures for the Committee of Creditors are detailed in regulation 25 of the Corporate Insolvency Resolution Process Regulations which provides that-

(i) Mandatory actions to be considered in meeting: The actions listed in section 28(1) shall be considered in meetings of the committee.

Prior Approval of committee of creditors for certain actions. -

- *Actions to be approved by Committee of Creditors:* Sub-section (1)of section 28 has overriding effect as it start with " Notwithstanding anything contained in any other law for the time being in force....................". It provides that the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely: -
- *Prior Approval of Committee of Creditors***:** The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).(Section 28 (2)).
- *Approval by Committee of Creditors:* No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of sixty-six per cent of the voting shares. (Section 28 (3))

Raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting.	Create any security interest over the assets of the corporate debtor.	Change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company.	Record any change in the ownership interest of the corporate debtor.
Give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting.	Undertake any related party transaction.	Amend any constitutional documents of the corporate debtor.	Delegate its authority to any other person.
Dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties.	Make any change in the management of the corporate debtor or its subsidiary.	Transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business.	Make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors.
	Make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.		

- *Consequence of action without approval:* Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void. (Section 28 (4))
- *Action against RP:* The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code. (Section 28 (5)).

(ii) **Other actions:** Any action other than those listed in section 28(1) requiring approval of the committee may be considered in meetings of the committee.

(iii) **Voting of members:** The resolution professional shall take a vote of the members of the committee present in the meeting, on any item listed for voting after discussion on the same.

(iv) **Announcement of decision by Resolution Professional**: At the conclusion of a vote at the meeting, the resolution professional shall announce the decision taken on items along with the names of the members of the committee who voted for or against the decision, or abstained from voting.

In the case of *K. Shashidhar,* the Supreme Court read Regulation 25(5) of the CIRP Regulations and with Section 30(4) of the Code and concluded as follows;

> *"For approval of the resolution plan, the "percent of voting share of the financial creditors" approving vis à vis dissenting is required to be reckoned. It is* ***not on the basis of members present and voting*** *as such. At any rate, the approving votes must fulfil the threshold percent of voting share of the financial creditors."*

Therefore, the Hon'ble Supreme Court has **rejected** the principle of "*present and voting"* for the calculation of votes and has interpreted Regulation 25(5) to also cover members who may be absent for a given meeting. Moreover, Regulation 25(5) of the CIRP Regulations provides that where a member remains absent for meeting, he shall nonetheless have the opportunity to review the Minutes of the Meeting and cast his/her vote via electronic means.

(v) Minutes of the meeting of Committee of Creditors

- Regulation 24 of Corporate Insolvency Resolution Process Regulations provides for the duty of resolution professional to prepare minutes of each meeting of committee of creditors and circulate the same as follows:

  - *Disclosure in minutes:* The resolution professional shall ensure that minutes are made in relation to each meeting of the committee and such minutes shall disclose the particulars of the participants who attended the meeting in person, through video conferencing, or other audio and visual means.

  - *Circulation of minutes:* The resolution professional shall circulate the minutes of the meeting to all participants by electronic means within forty eight hours of the said meeting.

- *Regulation 25 of Corporate Insolvency Resolution Process Regulations provide for the manner of circulation of minutes as follows:*

  The resolution professional shall-

  (a) circulate the minutes of the meeting by electronic means to all members of the committee and the authorised representative, if any, within forty-eight hours of the conclusion of the meeting; and

  (b) seek a vote of the members who did not vote at the meeting on the matters listed for voting, by electronic voting system in accordance with regulation 26 where the voting shall be kept open, from the circulation of the minutes, for such time as decided by the committee which shall not be less than twenty-four hours and shall not exceed seven days.

  Provided that on a request for extension made by a creditor, the voting window shall be extended in increments of twenty-four hours period. It is further provided that the resolution professional shall not extend the voting window where the matters listed for voting have already received the requisite majority vote and one extension has been given after the receipt of requisite majority vote.

- *Circulation of minutes by the authorised representative (Regulation 25(6):* The authorised representative shall circulate the minutes of the meeting received under Regulation 25(5) to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

The Resolution Professional (RP) shall submit all resolution plans that comply with the provisions of the Code to the committee

The committee shall:
(a) evaluate the resolution plans as per evaluation matrix;
(b) record its deliberations on the feasibility and viability of each resolution plan; and
(c) vote on all such resolution plans simultaneously.

Where only one resolution plan is put to vote, it shall be considered approved if it receives requisite votes.

Where two or more resolution plans are put to vote simultaneously, the resolution plan, which receives the highest votes, but not less than requisite votes shall be considered as approved.

Where two or more resolution plans receive equal votes, but not less than requisite votes, the committee shall approve any one of them, as per the tie-breaker formula announced before voting.

Where none of the resolution plans receives requisite votes, the committee shall again vote on the resolution plan that received the highest votes, subject to the timelines under the Code.

The RP shall endeavour to submit the resolution plan approved by the committee to the Adjudicating at least 15 days before the maximum period for completion of CIRP.

(vi) Voting by electronic means: Regulation 26 provides for the procedure for voting by electronic means in the following manner:

1. The resolution professional shall provide each member of the committee the means to exercise its vote by either electronic means or through electronic voting system in accordance with the provisions of this Regulation.

2. At the end of the voting period, the voting portal shall forthwith be blocked.

3. At the conclusion of a vote held under this Regulation, the resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the committee who voted for or against the decision, or abstained from voting.

4. The resolution professional shall circulate a copy of the record made under sub-regulation (4) to all participants by electronic means within twenty four hours of the conclusion of the voting.

- It is further explained- For the purposes of these Regulations-

a) the expressions "voting by electronic means" or "electronic voting system" means	a "secured system" based process of display of electronic ballots, recording of votes of the members of the committee and the number of votes polled in favour or against, such that the voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralized server with adequate cyber security;	
b) the expression "secured system" means computer hardware, software, and procedure that	(i)	are reasonably secure from unauthorized access and misuse;
	(ii)	provide a reasonable level of reliability and correct operation
	(iii)	are reasonably suited to perform the intended functions; and
	(iv)	adhere to generally accepted security procedures.

Duties of resolution professional. – Section 25 (2) of the Code states that the resolution professional shall (e) maintain an updated list of claims (f) convene and attend all meetings of the committee of creditors; (i) present all resolution plans at the meetings of the committee of creditors.

(vii) Decision by Committee of Creditors*:* Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent of voting share of the financial creditors.

(viii) Right of Committee of Creditors to require information from RP: The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process which shall be furnished within a period of seven days of such requisition. [Section 21 (9&10)].

(ix) Voting rights of members of Committee consisting of operational creditors: A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.

Explanation – For the purposes of voting by Operational Credtiros-'total debt' is the sum of		
(a) the amount of debt due to the creditors listed in subregulation 2(a);	(b) the amount of the aggregate debt due to workmen under subregulation 2(b); and	(c) the amount of the aggregate debt due to employees under subregulation 2(c).

A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.

Right of Committee of Creditors to replace Resolution Professional

Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may resolve to replace him with another resolution professional at a meeting, by a vote of sixty-six per cent of voting shares, subject to a written consent from the proposed resolution professional in the specified form. The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority. **(Section 27)**

CASE LAWS

Is it necessary for CoC to give reason for replacement of IRP/RP?

Punjab National Bank Vs. Mr. Kirah Shah, Interim Resolution Professional of ORG Informatics Ltd. [CA (AT) (Ins) No. 749/2019]

In the impugned order, the AA noted that the application does not explain why the Interim Resolution Professional was replaced. Immediately after the first meeting of the Committee of Creditors, it is supposed to prefer an application under section 22, which was not done in this case. On appeal, the NCLAT held that the Committee of Creditors is not required to record any reason for replacing the RP that may otherwise call for proceedings against such Resolution Professional. Having decided to remove the Resolution Professional with 88 percent of the voting share, the Committee of Creditors was not open to the AA interfering with such decision, till it is shown that the decision of the Committee of Creditors is perverse or without jurisdiction.

Can CoC replace RP in any of its meeting without recording reason for the same?

Bank of India Vs. M/s Nithin Nutritions Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 497 of 2020 (with connected appeals)]

In the third Committee of Creditors meeting, the Interim Resolution Professional was replaced by another person as the RP. The appellant had filed an application before the AA for confirmation of the RP's appointment. The AA rejected the application on the basis that the Committee of Creditors's decision was taken in its third meeting (and not the first meeting, as prescribed in the IBC) and no reasons were given for not adopting the resolution to replace the Interim Resolution Professional in the first meeting.

In the appeal against the AA's order, the NCLAT observed that neither section 22 nor section 27 of the IBC requires the Committee of Creditors to give any reasons. The reason is that the relationship between the RP and the Committee of Creditors is that of confidence. If there is loss of confidence and the RP continues in the role, the corporate debtor would be put to loss because of the bad relationship between the Interim Resolution Professional/RP and the Committee of Creditors. The NCLAT further noted that initially section 16 of the IBC specified a 30-day term for the Interim Resolution Professional. This provision was substituted with effect from June 6, 2018, and now the term of the Interim Resolution Professional shall continue till the date of appointment of the RP under section 22. It also referred to regulation 17 of the Corporate Insolvency Resolution Process Regulations and observed that the Interim Resolution Professional continues as such by performing the functions of an RP from day 40. Considering these provisions, the NCLAT held that the Committee of Creditors has the requisite powers to propose changing the Interim Resolution Professional even in meeting/s subsequent to the first one and there is no requirement that they should give particular reasons for the change.

Approval of Resolution Plan by Committee of Creditors

The Code has provided the Committee with exclusive access to negotiations and also the final hand in dealing with business decisions. Thereby, the Committee of Creditors is also endowed with the mammoth responsibility of evaluating resolution plans and thereafter voting and approving the best resolution plan.

Regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 lays down the provisions of the approval of the resolution plan by the committee.

(i) *Approval of resolution plan by Committee of Creditors:* The committee of creditors may approve a resolution plan by a vote of **not less than sixty-six per cent of voting share of the financial creditors,** after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board. [Section 30(4)].

(ii) *A Resolution Applicant to attend meeting of Committee of Creditors:* The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered but the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor. [Section 30(5)].

APPLICATION TO EXTEND TIME PERIOD OF CORPORATE INSOLVENCY RESOLUTION PROCESS/ FAST TRACK CORPORATE INSOLVENCY RESOLUTION PROCESS

If Corporate Insolvency Resolution Process or Fast Track Corporate Insolvency Resolution Process couldn't be completed in 180 days/90 days respectively, an application for extension of time limit has to be made to the Adjudicating Authority which needs **approval by a resolution passed at a meeting of Committee of Creditors as follows:**

(i) Extension of *Time-limit for completion of insolvency resolution process beyond 180 days:* The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent. of the voting shares. [Section 12(2)].

(ii) *Extension of Time-limit for completion of fast track corporate insolvency resolution process.* - The resolution professional shall file an application to the Adjudicating Authority to extend the period of the fast track corporate insolvency resolution process beyond ninety days if instructed to do so by a resolution passed at a meeting of the committee of creditors and supported by a vote of seventy-five percent of the voting share. [Section 56 (2)].

It is clarified in Regulation 40 that the resolution professional shall continue to discharge his responsibilities under the corporate insolvency resolution process, till the application for extension is decided by the Adjudicating Authority.

Commercial Wisdom of Committee of Creditors

The Code places the CoC in control of the insolvency process. The courts have subsequently sanctified the decision-making power of the CoC. CoC's decision with requisite voting share in relation to the resolution plan is sacrosanct. The approved plan as stamped by the court is binding on all stakeholders including the dissenting creditors. The choice of resolution plan has been placed under the ambit of the 'commercial wisdom' of the CoC and is unchallenged. The courts have reiterated the primacy of the CoC's commercial wisdom on several occasions and restrained from interfering with its decision or commenting on the plan on merit.

CASE LAWS

The significance of "Commercial wisdom of Committee of Creditors" was discussed in details by Supreme Court in the case of ***Committee of Creditors of Essar Steel India Ltd. V. Satish Kumar Gupta & Ors (2019)*** where the Apex Court held that-

- At the outset it is important to be noted that the legislature in their wisdom under the provisions of the Insolvency and Bankruptcy Code, 2016 (Code) have left the decision-making in respect of commercial matters completely in the domain of the Committee of Creditors.
- In fact even the Bankruptcy Law Reforms Committee report (which formed the basis for the enactment of the Code) specifically notes the deliberate scheme of the Code, where the law does not prescribe any particular manner of insolvency resolution and leaves this commercial decision making process to the Committee Of Creditors without the interference of the legislature as well as judiciary. The Committee of Creditors does not act in any fiduciary capacity to any group of creditors. On the

contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissentient creditors.

- The NCLAT judgment which substitutes its wisdom for the commercial wisdom of the Committee of Creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside.
- It is always open to the Committee Of Creditors to adjudge the commercial wisdom of the resolution plan while approving it. As pointed out by the Supreme Court in ***K. Sashidhar vs Indian Overseas Bank & Ors.*** (Civil Appeal No. 10673 of 2018), such commercial decision of the Committee Of Creditors is not subject to appeal under the Code.
- The Hon'ble Apex Court specifically ruled that the NCLT must limit its judicial review to the parameters outlined in Section 30 (2) of IBC, while the NCLAT must adhere to the guidelines set forth in Section 32 in conjunction with Section 61(3) of the IBC.
- The NCLT and NCLAT must never interfere with a commercial decision made by the majority of the Committee of Creditors.

The Supreme Court passed its order in the case *of **K. Sashidhar v. Indian Overseas Bank & Ors. (Civil Appeal No. 10673 of 2018)*** wherein the SC, inter alia, has held that

- the National Company Law Tribunal ("**NCLT**") and the National Company Law Appellate Tribunal ("**NCLAT**") have no jurisdiction and authority to analyse or evaluate the commercial decisions taken by the committee of creditors ("**Committee of Creditors**").
- Non recording of reasons for approving or rejecting the resolution plan by the concerned financial creditors during the voting in the meeting of Committee of Creditors, would not render the final collective decision of Committee of Creditors nullity per se.
- Concededly, if the objection to the resolution plan is on account of infraction of ground(s) specified in section 30(2) and 61(3), that must be specifically and expressly raised at the relevant time. For the approval of resolution plan by the Committee of Creditors can be challenged on those grounds.
- However, if the opposition to the proposed resolution plan is purely a commercial or business decision, the same, being non-justiciable is not open to challenge before the Adjudicating Authority (NCLT) or for that matter the Appellate Authority (NCLAT). If so, non-recording of any reason for taking such commercial decision will be of no avail.
- The Hon'ble National Company Law Appellate Tribunal has held that the Committee of Creditors has the discretion to approve any resolution plan and its decision to approve the same cannot be interfered with by the Adjudicating Authority or the Appellate Authority, except for in terms of Section 31(1) to examine compliance of Section 30(2) read with relevant regulations. *(Ref:Kannan Tiruvengandram Vs. M.K. Shah Exports Ltd. & Ors. in and Darshak Enterprise Pvt. Ltd. and Ors. v. Chhaparia Industries Pvt. Ltd. and Ors. E.)*

In ***Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another, 2021 SC,*** the Hon'ble Supreme Court, has reiterated that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous and the commercial wisdom of Committee of Creditors is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I&B Code.

In ***Vallal Rck vs M/S Siva Industries And Holdings ... on 3 June, 2022,*** Supreme Court held that this Court has consistently held that the commercial wisdom of the Committee of Creditors has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. Neither the learned NCLT nor the learned NCLAT were justified in not giving due weightage to the commercial wisdom of Committee of Creditors.

Therefore, supremacy of commercial wisdom of Committee of Creditors has been held persistently by the Apex Court since the inception of the Code.

Jindal Stainless Ltd. v. Mr. Shailendra Ajmera, Resolution Professional of Mittal Corp Ltd. & Ors. Case no.: Comp. App. (AT) (Ins.) No. 1058 of 2022 Decision Date: January 18, 2023, *National Company Law Appellate Tribunal, Delhi:*

Facts:

1. Mittal Corp Limited (Corporate Debtor) was admitted into Corporate Insolvency Resolution Process on 10.11.2021 by the Adjudicating Authority.

2. The Resolution Applicants were communicated the rules of Challenge Process and gave their unconditional acceptance to the same.

3. All the Resolution Applicants were notifi ed that the signed and compliance Resolution Plan must be submitted by 18.07.2022. Jindal Stainless Ltd., Shyam Sel and Power Ltd. along with two other resolution applicants submitted their amended Resolution Plans by 18.07.2022.

4. An application for consideration of amended resolution plans was also filed with the Adjudicating Authority.

Issue:

Can decision of CoC to vote on a resolution modified in given timeline and refuse to consider other modified after time stipulated for same be questioned?

Held:

1. Taking note of Regulation 39 (1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the regulation has been brought in place to enable the Committee of Creditors to negotiate with all the Resolution Applicants by one alternative mechanism to find out the best resolution plan.

2. Clause 7 of the Challenge Process clearly contemplates that after conclusion of the Challenge Process, the eligible Resolution Applicants shall not revise their bid/commercial offer. It is relevant to note that Challenge Process also reserves the unconditional right of the Committee of Creditors to cancel/ modify/ withdraw/ abandon/ amend the process of the Challenge Process at any stage. The approval of the plan submitted in Corporate Insolvency Resolution Process is in the domain of the Committee of Creditors. Under Regulation 39 of the Corporate Insolvency Resolution Process Regulations, the committee is entitled to record its deliberation and vote on such resolution plan simultaneously.

3. There can be no fetter on the power of the Committee of Creditors to cancel or modify any negotiation with the Resolution Applicant including a Challenge Process but it is the wisdom of the Committee of Creditors to take a decision in that regard. Committee of Creditors, in the facts of the present case, did not take any decision to disregard the Challenge Process, rather it decided to vote on the plan.

4. It is well settled that the timeline in the IBC has its salutary value, and it was the wisdom of the Committee of Creditors which decided to vote on the Resolution Plan after completion of Challenge Process and not to proceed to take any further negotiation or further modification of the plan, that decision ought not to have been interfered with.

5. The decision of Committee of Creditors to vote on the Resolution Plan after completion of Challenge Process and not to further accept any modification of the plan, should not be interfered with. The

Application was filed by Shyam Sel and Power Ltd. on 07.08.2022, when Committee of Creditors had already resolved the vote on all the plans and voting had also commenced w.e.f. 07.08.2022.

Source: ICSIIP Quarterly Newsletter

In the case of ***Vishal Chelani & Ors. vs. Debashis Nanda [Civil Appeal No. 3806 of 2023]***, the issue before Supreme Court was whether there could be different treatment of allotees in the resolution plan for the one who had invoked RERA and of others who did not approach RERA?

Hon'ble Supreme Court in its order dated October 06, 2023, inter alia observed that the Resolution Professional's view appears to be that once an allottee seeks remedies under RERA, and opts for return of money in terms of the order made in her favour, it is not open for her to be treated in the class of home buyer. This Court is unpersuaded by the submission. It is only home buyers that can approach and seek remedies under RERA – no others. In such circumstances, to treat a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable. As held in Mr. *Natwar Agrawal (HUF) vs. Ms. Ssakash Developers & Builders Pvt. Ltd.* by the Mumbai Bench of National Company Law Tribunal the underlying claim of an aggrieved party is crystallized in the form of a Court order or decree. That does not alter or disturb the status of the concerned party - in the present case of allottees as financial creditors. Furthermore, Section 238 of the IBC contains a non obstante clause which gives overriding effect to its provisions. Consequently, its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. In any case, the distinction made by the R.P. is artificial; it amounts to "hyper classification" and falls afoul of Article 14. Such an interpretation cannot therefore, be countenanced.

The impugned order of NCLAT set aside by the Supreme Court and Hon'ble Apex Court ordered that the appellants are declared as financial creditors within the meaning of Section 5(8)(f) (Explanation) and entitled to be treated as such along with other home buyers/financial creditors for the purposes of the resolution plan which is awaiting final decision before the adjudicating authority.

LESSON ROUND-UP

- The committee of creditors is the most important business decision-making body in every corporate insolvency resolution process.
- The Code has shifted the control from debtor to creditor in taking decision with respect to a corporate debtor undergoing insolvency resolution process.
- Section 18 and Section 21 of the Code, obligate the Interim Resolution Professional to constitute the Committee of Creditors, after the collation of the proof of claims. As per sub-section (2) of Section 21, the Committee shall comprise "all financial creditors of the corporate debtor".
- The committee of creditors is composed of financial creditors of the corporate debtor as the financial creditors have the capability to assess the commercial viability of the corporate debtor and are willing to modify the terms of the debt contracts in negotiations between the creditors and the corporate debtor.
- Regulation 16 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), provides that CoC shall consists of operational creditors where the corporate debtor has (i) no financial debt; or (ii) where all financial creditors are related parties and this Committee shall consist of (a) eighteen largest operational creditors by value; (b) one representative of workmen; and (c) one representative of employees of the corporate debtor.
- The CoC carries out its functions through its meetings. The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) provides in detail, the manner in which these meetings have to be conducted.
- The meetings are convened and chaired by the RP in his/her capacity as Interim Resolution Professional (IRP) or RP, as the case may be.

- The notice should be shared with all its members- the unrelated financial creditors including the authorised representative of a class of creditors; members of the suspended Board of Directors or Partners of the corporate debtor and operational creditors (OCs) or their representatives if their aggregate dues is not less than 10% of the debt. The notice can be shared electronically also.
- Quorum of at least 33% of the voting rights are present either in person or by video conferencing or other audio and visual means is required for conduct of a meeting.
- The CoC exercises its power of decision making through the process of voting.
- The Code provides that the thresholds for general decision making in the CoC should not be less than 51%.
- Instances involving significant actions that impact the working of the CD or the CIRP inter alia include raising of interim finance; creating security interest on assets of the CD; change in ownership or capital structure; amend constitutional documents of the CD; change management of the CD or its subsidiary; appointment of statutory auditor or internal auditor and replacement of a RP require a higher threshold of 66%. Where the CoC decides to accept the applicants' request for withdrawal which has the effect of terminating the CIRP midway requires a still higher threshold of 90%.
- CoC is the decision-making body in the CIRP. The Code and the courts have left a wide ambit of commercial and business decisions to the CoC.
- The Hon'ble Supreme Court (SC) reiterated in its judgement in the *K. Sashidhar v. Indian Overseas Bank & Ors* that the commercial wisdom of CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed... the legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation.)

1 Define financial debt under the provisions of the Code.

2 List out the procedure till conduct of first meeting of Committee of Creditors by Interim Resolution Professional according to IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

3 What is the constitution of Committee of Creditors with operational creditors only?

4 What should be the quorum at the meeting of Committee of Creditors?

5 Explain "Commercial Wisdom of Committee of Creditors" with reference to decided case laws.

REFERENCES

- IBBI Handbook 2019
- IBBI quarterly newsletter
- ICSIIIP Journal
- Promoting common good amidst anti-common behaviour of stakeholders: Role of Committee of Creditors, Sudhaker Shukla and Kokila Jayaram