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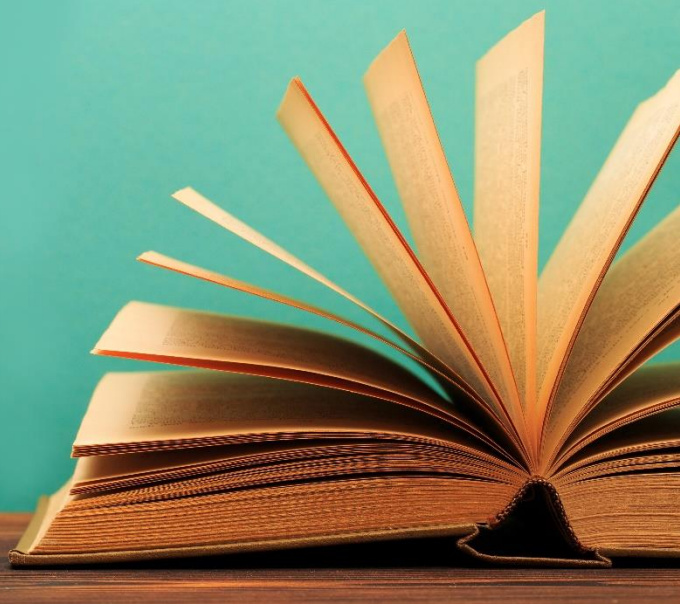

Commercial wisdom of Committee of Creditors

By: Faranaaz G Karbhari, Counsel & Akriti Shikha, Associate

As per provisions of the Insolvency and Bankruptcy Code, 2016 (**IBC** or **Code**), in case of any defaults in paying a debt, financial and other creditors of Corporate Debtor or the Corporate Debtor itself can seek resolution of such Corporate Debtor by initiating the Corporate Insolvency Resolution Process (**CIRP**) and engaging independent Resolution Professional (**RP**) for a period of 180 days, which may be extended to a maximum of 330 days. During the CIRP, the Interim Resolution Professional (**IRP**) constitutes the Committee of Creditors (**CoC**), which is a committee consisting of the financial creditors of the Corporate Debtor and is the decision-making body regarding the administration of the Corporate Debtor, based on a majority vote of the members. The power lies in the hands of the CoC to consider and then approve a Resolution Plan by a vote of 66 % of the voting shares, in accordance with Sections 30 and 31 of the IBC. However, this is subject to the final approval of the Resolution Plan by the concerned National Company Law Tribunal (**NCLT**).

The supremacy of commercial wisdom of the CoC has been reaffirmed time and again by the NCLT, National Company Law Appellate Tribunal (**NCLAT**) and the Supreme Court (**SC**). However, on numerous instances, the courts have been tempted to adjudicate upon the extent of its interference in the decision made by the CoC.

Key instances of judicial intervention

- One such instance is the case of **K. Sashidhar v. Indian Overseas Bank & Ors**[1], which involved a critical question on the scope of judicial scrutiny over a commercial decision taken by the CoC to approve or reject a Resolution Plan. In this matter, the SC noted that the legislature, while enacting the IBC, has consciously not provided any ground to challenge the commercial wisdom of the individual financial creditors or the collective decision of the CoC before the NCLT/NCLAT and that the decision of CoC's commercial wisdom has been made non-justiciable. The Court held that neither the NCLT nor the NCLAT has the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and clarified that the amendment made to Section 30 (4) of the IBC – which came into force w.e.f. June 6, 2018 vide the IBC (Second Amendment) Act, 2018 and introduced the requirement for the CoC to consider the feasibility and viability of a Resolution Plan before its approval – was simply a restatement of the factors that the CoC is required to bear in mind while considering approval of a Resolution Plan.
- In its landmark ruling in **Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta & Ors**[2], the SC had again re-emphasized the primacy of the commercial wisdom of the CoC by holding that the scope of judicial review by NCLT while approving a Resolution Plan was required to be within the parameters of Section 30 (2) of the IBC and with respect to the NCLAT, it must be within the parameters of Section 32 read with Section 61 (3) of the IBC. The SC further observed that the NCLT/NCLAT can under no circumstance trespass upon a commercial decision of the majority of the CoC. Furthermore, the SC also held that

[1] (2019) 12 SCC 150
[2] (2020) 8 SCC 531

the limited judicial review available by NCLT/NCLAT is to see that the CoC's decision has considered the following parameters:

- That the Corporate Debtor needs to continue as a going concern during the insolvency resolution process
- That it needs to maximise the value of the assets of the Corporate Debtor
- That interests of all stakeholders, including operational creditors, have been taken care of

- This judgment has been followed in various decisions by the NCLT and NCLATs, and this view was reaffirmed by the SC in **Maharashtra Seamless Ltd v. Padmanabhan Venkatesh & Ors**[3].
- In a similar vein, a recent case of **Kalpraj Dharamshi & Anr v. Kotak Investment Advisors Ltd & Anr**[4], involving, inter alia, the question as to whether the NCLAT can interfere with commercial decisions taken by the CoC was raised again before the SC. The facts of this case are as follows:
  - An application was filed by Ricoh India Ltd, the Corporate Debtor, under Section 10 of the IBC for initiating its own CIRP, which was admitted by the NCLT.
  - Thereafter, the CoC was constituted, and Resolution Plans were submitted by Mr. Kalpraj Dharamshi and Ms. Rekha Jhunjhunwala's consortium (**Kalpraj**), Kotak Investment Advisors Ltd (**KIAL**), Karvy Data Management Systems Ltd and WeP Solutions Ltd. However, since Kalpraj submitted its Resolution Plan beyond the prescribed time limit, KIAL raised objections against the same. Accordingly, the CoC directed all Resolution Applicants to submit their revised plans.
  - Subsequently, the Resolution Plan submitted by Kalpraj was approved by the CoC and placed for approval by the RP before the NCLT. KIAL then filed an objection to the approval of the plan, which was rejected by the NCLT. Aggrieved by this decision, KIAL filed a Writ Petition before the Bombay High Court, which dismissed the petition holding that KIAL had an effective and alternate remedy by filing an appeal before the NCLAT.
  - KIAL then filed an appeal before the NCLAT, which set aside the order of NCLT and directed CoC to take a fresh decision considering only such Resolution Plans that had been filed in time.
  - Aggrieved by the NCLAT's decision, Kalpraj and others filed appeals before SC.

  In the instant case, the three-judge bench of the SC upheld that the commercial wisdom of Coc is not to be interfered with, other than in the limited scope as provided under Sections 30 and 31 of the IBC. Some of the key observations made by the SC in this matter are as below:
  - While arriving at its decision, the SC placed reliance on the aforementioned judgments and upon the Report of Bankruptcy Law Reforms Committee[5] (**BLRC**). It observed that the BLRC had ensured that the business decision regarding appropriate disposition of a defaulting company should be made solely by the CoC.
  - The SC noted that the CoC's decision had a majority of 84.36% and since all actions of the RP had been consciously approved by the CoC, including the approval of Resolution Plan of Kalpraj pursuant to the due date, the same cannot be interfered with in view of the paramount importance given to the commercial wisdom of CoC.
  - In view of the above, it was held that the decision of the NCLAT was not correct in law and it had acted beyond its jurisdiction by interfering with the commercial decision of the CoC.
- In another recent case of **Ghanashyam Mishra & Sons Pvt Ltd through the Authorized Signatory v. Edelweiss Asset Reconstruction Co Ltd through the Director & Ors**[6], the SC referred to its previous decisions and reasserted that the commercial wisdom of CoC has been given paramount importance and the scope of judicial review is limited to the extent as provided under Sections 31 and 61(3) of the IBC.

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[3] (2020) 11 SCC 467

[4] 2021 SCC OnLine SC 204

[5] Ministry of Finance, Government of India, The Report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design (November 2015).

[6] 2021 SCC OnLine SC 313

Our viewpoint

The recent judgments of *Kalpraj* and *Ghanashyam* have once again reinforced the primacy of commercial wisdom of the CoC. Arguably, the most crucial decision taken by the CoC is the approval or rejection of the Resolution Plan. Discharging this responsibility that the CoC carries, emphasized upon by the SC in the decisions of **Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors**[7] and **Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India**[8], entails determining the viability and feasibility of Resolution Plans, ascertaining the eligibility of the Resolution Applicants, ensuring fair equitable treatment to operational creditors and making all endeavors for resolution with liquidation as the last resort.

It is pertinent to highlight that the premise of this principle lies upon an intrinsic assumption that financial creditors are fully informed about the viability of the Corporate Debtor and the feasibility of the proposed Resolution Plan and its impact on all the stakeholders, and, therefore, they act pursuant to scrupulous examination of the Resolution Plan. Resultantly, it is based on this meticulous assessment and use of qualified knowledge by the CoC that a collective decision is made.

The question regarding the autonomy of the CoC *vis-à-vis* the jurisdiction of the NCLT/NCLAT has been consistently dealt with by the courts and the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the CIRP within the prescribed timeline. It is now a settled law that in so far as the feasibility and viability of the Resolution Plan is concerned, the CoC is the expert body to determine whether the Resolution Plan is viable and feasible, as the CoC alone can deal with the underlying technical complexity and merits. Thus, the responsibility that has been placed upon the CoC is one that it cannot shy away from and cannot be questioned, except on limited grounds.

[7] (2019) 2 SCC 1
[8] 2019 SCC OnLine SC 73