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Corporate Insolvency in India: Creditor Control and its Comparative Discontents

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Corporate Insolvency in India: Creditor Control and its Comparative Discontents

ABSTRACT

The Insolvency and Bankruptcy Code, 2016 rebuilt Indian insolvency law around a single idea: the creditor decides. A committee of financial creditors, voting by value, now holds the fate of a defaulting company, while the former managers are displaced and, where they have defaulted, barred outright from buying their way back. This creditor in control design was a deliberate rejection of the management friendly model that had failed India for decades. The official defence of the model rests on a striking statistic. Creditors recover only about a third of what they are owed, a haircut of roughly two thirds, yet they recover well over one and a half times what the company would fetch in liquidation. This paper argues that the second figure has quietly become the system's measure of success, and that this is the heart of the problem. By benchmarking itself against liquidation value rather than against the debt actually owed, the creditor control model has redefined success downward to the very floor it was built to rise above. Drawing on the latest official data, on the dominance of liquidation as the actual terminal outcome, and on a comparison with the debtor in possession tradition of the United States and the rescue oriented restructuring regime of the United Kingdom, the paper contends that the costs of creditor control are not incidental defects but the predictable product of where the Code placed power. The Insolvency and Bankruptcy Code (Amendment) Bill, 2025, which both tightens creditor control and, for the first time, admits a limited debtor in possession element, is best understood as the legislature's own admission that the model needs the very correction its critics have urged. The discontents of creditor control have moved from the academic literature into the statute book.

KEYWORDS

Corporate, Insolvency, Creditor, Bankruptcy, Interest.

I. INTRODUCTION

For most of its independent history India did not have a coherent law of corporate insolvency so much as a scattered collection of statutes that worked at cross purposes. A distressed company could find itself caught between the Sick Industrial Companies (Special Provisions) Act, 1985, the recovery jurisdiction of the Debts Recovery Tribunals, the security enforcement powers under the securitization legislation of 2002, and the winding up provisions of the Companies Act. Each forum guarded its

own turf. Each gave a different set of actors the upper hand. The result was delay measured in years, recovery measured in cents on the rupee, and a credit culture in which default carried little real consequence for the people who controlled the defaulting firm.

The Insolvency and Bankruptcy Code, 2016 was meant to end that. It consolidated the law, created a time bound process, and, most importantly for present purposes, made a decisive choice about who should be in charge once a company defaults. The answer the Code gave was the creditors, and in particular the financial creditors, acting collectively through a committee of creditors. This is the feature that defines the Indian system and separates it from much of the world. The managers who ran the company into the ground do not stay at the helm to negotiate their own rescue. An independent professional displaces them, and a creditor committee voting by the value of its claims takes the commercial decisions that will decide whether the company lives or dies.

This paper is about that choice and its consequences. The claim is straightforward. Creditor control is not simply a procedural detail. It is a deliberate allocation of power that produces a particular pattern of outcomes, and those outcomes carry costs that the original framers either underestimated or accepted as the price of breaking with the past. Some of those costs are now serious enough that the legislature itself has moved to address them, most visibly through the Insolvency and Bankruptcy Code (Amendment) Bill, 2025.

The argument proceeds in stages. Part II sets out what creditor control actually means under the Code and how it became the organising principle of Indian insolvency law. Part III examines the record using the latest official data on recovery, timelines, and the dominance of liquidation, and argues that the system has redefined its own measure of success. Part IV turns to comparison, placing the Indian model beside the debtor in possession system of the United States and the rescue oriented restructuring regime of the United Kingdom, and uses that comparison to show that the redefinition of success was a choice rather than a necessity. Part V analyses the 2025 amendments and argues that they amount to the legislature's own admission that the model needs correction. Part VI confronts the strongest objections to the thesis, including one it cannot fully answer. Part VII concludes.

A word on the comparison is needed at the outset, because comparison in Indian legal writing too often serves as ornament. It is included here only where the foreign system answers a question the Indian analysis raises. The United States is relevant because it sits at the opposite pole. Where India strips management of control, the American system leaves the existing management in possession of the business throughout

reorganisation. The contrast is not incidental. It goes to the heart of what creditor control costs and what it buys. The United Kingdom is relevant for a different reason. It has spent two decades moving away from a creditor dominated administration model toward a more debtor friendly restructuring regime, and that journey is a mirror in which India can see a possible version of its own future.

II. THE ARCHITECTURE OF CREDITOR CONTROL

A. The committee of creditors as the centre of gravity

The corporate insolvency resolution process under the Code begins when an application is admitted by the adjudicating authority, the National Company Law Tribunal. On admission, a moratorium descends, shielding the company from enforcement actions, and an interim resolution professional takes charge. The board of directors stands suspended. Management powers vest in the professional. This displacement of the incumbent management is the first structural marker of creditor control, and it is worth pausing on, because it is the precise opposite of what happens in the United States.

The professional then constitutes the committee of creditors from the company's financial creditors. This committee is the centre of gravity of the entire process. It approves or rejects resolution plans, it can replace the resolution professional, it decides whether to extend the process, and its commercial judgment on the fate of the company is, within wide limits, beyond the second guessing of the tribunal. Decisions are taken by a voting threshold measured in the value of admitted financial claims rather than by a headcount of creditors. The bigger the exposure, the louder the voice.

The Supreme Court has repeatedly underlined that the commercial wisdom of the committee of creditors is paramount and is not ordinarily subject to judicial review on its merits. In K. Sashidhar v. Indian Overseas Bank the Court held that the adjudicating authority has no jurisdiction to evaluate the commercial merits of the committee's decision to approve or reject a plan.[1]

In Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta the Court reaffirmed the primacy of the committee while clarifying that its discretion must still be exercised within the boundaries of the Code, including a measure of fair treatment for operational creditors.[2] The phrase commercial wisdom has since become a kind of

[1] The case name appears in the text, so only the citation is given here per the ILI rule: *K. Sashidhar v. Indian Overseas Bank*, (2019) 12 SCC 150.

[2] *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta*, (2020) 8 SCC 531.

judicial shorthand for deference to the creditor body.

B. The exclusion of the defaulting promoter

If the displacement of management is the first marker of creditor control, the exclusion of the defaulting promoter is the second, and it is sharper still. Section 29A of the Code, introduced by amendment in 2017, disqualifies a range of persons from submitting a resolution plan, most significantly those who were in control of the corporate debtor and whose account had been classified as non performing for the requisite period.[3] The provision was a direct response to the fear that promoters who had driven their companies into default would simply buy the assets back at a discount through the resolution process, shedding their debts while keeping their businesses.

The Supreme Court upheld the provision in Arcelormittal India Private Limited v. Satish Kumar Gupta and in Chitra Sharma v. Union of India, treating it as a legitimate policy choice to keep the resolution process clean.[4] The effect, however, is profound. In a country where a large share of corporate enterprise is promoter driven and closely held, barring the promoter often means barring the person with the deepest knowledge of the business and, frequently, the only party with a real interest in reviving it as a going concern rather than stripping it for parts. Section 29A is creditor control in its most uncompromising form. It does not merely move the promoter to the sidelines. It removes the promoter from the field.

C. Why India chose this model

The choice of creditor control was not accidental and it was not borrowed unthinkingly. It was a reaction to a specific Indian pathology. Under the earlier regime, and in particular under the sick industries legislation, control of the distressed company tended to remain with the very management that had presided over its decline. That management had every incentive to delay, to litigate, and to keep the company in a state of suspended animation while creditors waited. The Bankruptcy Law Reforms Committee, whose 2015 report laid the intellectual foundation for the Code, identified this misalignment as the core problem and proposed a creditor in control solution as the cure.[5] The committee's reasoning was that those whose money is at stake will have the strongest incentive to make a quick and value maximising decision, and that the

[3] The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s. 29A, inserted by the Insolvency and Bankruptcy Code (Amendment) Act, 2018 (Act 8 of 2018).
[4] *Arcelor Mittal India Private Limited v. Satish Kumar Gupta*, (2019) 2 SCC 1; *Chitra Sharma v. Union of India*, (2018) 18 SCC 575.
[5] Government of India, *Report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design* (Ministry of Finance, 2015).

law should therefore vest decision making in them rather than in a defaulting management or a slow moving court.

The logic is coherent on its own terms. Whether it has worked is a separate question, and it is to that question that the next Part turns.

III. THE RECORD OF CREDITOR CONTROL

A. The redefinition of success

The official defence of the Code rests on two numbers that point in opposite directions, and the choice of which one to emphasise is the whole argument. As of September 2025, creditors had realised roughly thirty three percent of their admitted claims under approved resolution plans. Put the other way, the haircut was about sixty seven percent. Creditors as a class have surrendered roughly two thirds of what they were owed.[6] On any plain reading that is a poor result, and it is the result the model's critics emphasise.

The model's defenders emphasise a different number. Measured against the liquidation value of the same companies, recovery under resolution plans has run at well over one hundred and seventy percent.[7] In other words, creditors recover far more through the Code than they would by simply breaking the company up and selling the pieces. This is presented, not unreasonably, as proof that the Code works. The defence has real force. A company does not default while healthy, and by the time it reaches the tribunal much of its value is already gone. If the relevant comparison is what creditors would otherwise have salvaged from a corpse, the Code looks like a success.

But this is precisely where the argument of this paper bites. The two benchmarks are not equal, and the quiet substitution of one for the other is the most revealing move in the entire defence of the model. The Code was sold to the country on the promise of rescue, of keeping viable businesses alive, of changing a credit culture in which default carried no consequence. It was not sold as a marginally better way to run a liquidation. To measure its success against liquidation value is to measure it against the very outcome it was built to replace. It is to grade the system against the floor rather than the goal. A regime that recovers one hundred and seventy percent of liquidation value while returning

[6] Insolvency and Bankruptcy Board of India, *Quarterly Newsletter, July-September 2025* (IBBI, New Delhi, 2025), available at: https://ibbi.gov.in (last visited on May 26, 2026). As of September 2025 creditors had realised approximately Rs. 3.99 lakh crore against admitted claims of approximately Rs. 12.31 lakh crore, a realisation of roughly 33 percent and a haircut of roughly 67 percent.

[7] *Supra* note 6. Resolved cases yielded a realisation of approximately 171 percent of liquidation value, the figure on which defenders of the Code principally rely.

only thirty three percent of what was actually owed has not vindicated the rescue ideal. It has redefined success downward until the floor became the target. The persuasive power of the liquidation value comparison is real, but it is the persuasive power of a moved goalpost.

B. The collapse of the timeline

The Code was sold on the promise of resolution within a fixed period. The original design contemplated completion within one hundred and eighty days, extendable by ninety days, with a later amendment imposing an outer limit of three hundred and thirty days inclusive of litigation.[8] The reality has diverged sharply from the design. As of mid 2025, cases that ended in an approved resolution plan had taken, on average, around six hundred days to conclude, nearly twice the statutory ceiling, and the great majority of pending cases had already run past two hundred and seventy days.

The collapse of the timeline matters more under this model than it would under another, and the reason ties directly to the recovery figures.[9] If most of a company's value is already gone by the time it enters the process, then every additional month of delay erodes what little remains. A model that defends its low recovery on the ground that value was destroyed before admission cannot then tolerate a process that takes twice its promised length, because the delay compounds the very value destruction the defence relies upon. The two defences of the model, that the haircut reflects pre existing value loss and that the system is working, are in tension with each other once the timeline data is admitted. The longer the process runs, the weaker the claim that the loss was all baked in before the creditors took control.

The reasons are not mysterious. Litigation at every stage, contested admissions, challenges to the eligibility of resolution applicants, disputes over the treatment of particular creditors, and the sheer congestion of the tribunals have all combined to stretch the timeline. The Supreme Court itself, in Committee of Creditors of Essar Steel, read down the mandatory character of the outer limit, holding that the period could be extended in appropriate cases where the delay was not attributable to the parties.[10] That holding was humane and probably necessary given the realities of the tribunal system, but it also blunted the single most important

[8] The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s. 12. The outer limit of three hundred and thirty days was introduced by the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (Act 26 of 2019).

[9] Government of India, *Review of the Working of Insolvency and Bankruptcy Code* (Ministry of Corporate Affairs, 2025); see also *supra* note 6. As of June 2025 the average duration of cases resulting in a resolution plan was approximately 602 days against the statutory outer limit of 330 days.

[10] *Supra* note 2.

discipline the Code was supposed to impose. A time bound process whose time limit is not binding is a contradiction the system has not resolved.

C. Liquidation as the default outcome

Perhaps the most uncomfortable fact about the record is that liquidation, not resolution, has been the dominant terminal outcome. Of the corporate insolvency resolution processes that have been closed, roughly forty four percent ended in liquidation, a markedly larger share than those ending in an approved resolution plan.[11] The Code's stated preference, expressed in its very structure, is rescue. Liquidation is meant to be the outcome of last resort. In practice it has been the more common destination.

The instability of the line between resolution and liquidation is captured by the protracted insolvency of a large steel producer. The Supreme Court first set aside a fully implemented resolution plan and ordered liquidation in May 2025, citing breaches of timeline and unfair treatment of operational creditors, then recalled that judgment, and finally in September 2025 upheld the plan.[12] The episode cuts in two directions at once, which is why it is so revealing. The initial liquidation order showed how readily even a completed resolution can be unwound years later, and the grounds it gave, delay and the neglect of operational creditors, were precisely the discontents catalogued in this paper. The final reversal then rested on the primacy of the committee's commercial wisdom and the value of finality, the very doctrine whose expansion this paper questions. A single case thus displays both the fragility of resolution and the strength of the deference that protects it once the dominant creditors have spoken.

This matters for the argument about creditor control in a direct way. A committee dominated by secured financial creditors may rationally prefer a quick liquidation that returns a predictable sum to a slower resolution that promises more but carries execution risk. The incentive of a secured creditor is not identical to the social interest in keeping a viable business alive, preserving jobs, and maintaining the company as a going concern. Where the two diverge, creditor control ensures that the creditor's preference prevails. This is not a malfunction of the model. It is the model working exactly as designed. The high rate of liquidation is

[11] *Supra* note 6. Of corporate insolvency resolution processes that had been closed, approximately 44 percent ended in liquidation, a markedly higher share than those ending in an approved resolution plan.

[12] *Kalyani Transco v. Bhushan Power and Steel Limited*, 2025 INSC 621 (judgment dated May 2, 2025, directing liquidation), recalled on July 31, 2025, and finally decided in *Kalyani Transco v. Bhushan Power and Steel Limited*, Civil Appeal No. 1808 of 2020 (decided Sept. 26, 2025), upholding the resolution plan.

therefore not evidence that the system is broken. It is evidence that the system faithfully serves the interests of those it placed in charge, and that those interests are not the same as the rescue objective the Code proclaims.

D. Operational creditors and the fairness question

A further strain runs through the creditor control model along the fault line between financial and operational creditors. Financial creditors are, broadly, those who lent money. Operational creditors are those owed money for goods and services, including suppliers, employees, and trade creditors. The Code gives the committee of creditors to the financial creditors. Operational creditors, with limited exceptions, do not vote. Their fate is decided by a body in which they have no seat.

The Supreme Court confronted a constitutional challenge to this distinction in Swiss Ribbons Private Limited v. Union of India and upheld it, reasoning that the two classes are differently situated and that the differentiation has a rational basis connected to the object of the Code.[13] The Court's reasoning is defensible. Financial creditors are generally better placed to assess the viability of a restructuring, and including a fragmented mass of operational creditors in the decision making body would slow the process and invite paralysis. Yet the practical consequence is that operational creditors frequently recover little or nothing, and they have no voice in the decision that determines their fate. The fairness objection does not disappear merely because the classification survives constitutional scrutiny. It is a cost of the creditor control model, recorded here as such.

IV. THE COMPARATIVE MIRROR

Before turning to the two comparators, it is worth naming the theoretical question that the comparison brings into focus, because the Indian debate has often proceeded as though the choice between creditor control and debtor control were merely a matter of administrative efficiency. It is not. It rests on a deeper disagreement about what insolvency law is for. One influential tradition, associated above all with Thomas Jackson and the idea of the creditors' bargain, holds that insolvency law exists to solve a collective action problem among creditors and should do little more than maximise and distribute the value of the estate as the creditors themselves would have agreed in advance.[14] On this view a strong creditor control model is not an aberration but the natural expression of the purpose of the law, and the high rate of liquidation is unobjectionable

[13] *Swiss Ribbons Private Limited v. Union of India*, (2019) 4 SCC 17.

[14] Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 17 (Harvard University Press, Cambridge, Mass., 1986).

so long as it maximises creditor returns.

A competing tradition treats insolvency law as serving wider interests than those of the creditors alone, including the preservation of going concern enterprises, the protection of employees and other non adjusting stakeholders, and the maintenance of the productive capacity of the economy.[15] Roy Goode's influential account of corporate insolvency, for instance, insists that the law must reconcile the legitimate interests of creditors with broader public concerns rather than treating creditor wealth maximisation as the sole objective.[16] The disagreement between these two traditions is the hidden fault line beneath the Indian debate. A reader who accepts the creditors' bargain account will see nothing wrong in the Indian record, while a reader who accepts the broader account will see in it a system that has allowed one stakeholder group to capture an institution meant to serve many. The comparison that follows is a way of asking which account India has, perhaps without fully intending to, written into its law.

A. The opposite pole: debtor in possession in the United States

The American approach to corporate reorganisation, embodied in Chapter 11 of the Bankruptcy Code, rests on a premise that is almost the exact inverse of the Indian one. When a company files for reorganisation under Chapter 11, the existing management ordinarily stays in control of the business as what the statute calls the debtor in possession.[17] There is no automatic displacement of the board, no mandatory installation of an outside professional to run the company, and no equivalent of Section 29A barring the incumbents from shaping the plan. The debtor in possession runs the business, proposes the plan of reorganisation, and enjoys, for an initial period, the exclusive right to do so.

The justification for this design is the mirror image of the Indian justification. The American premise is that the existing management knows the business better than anyone, that a going concern is usually worth more than its liquidated parts, and that keeping the people who understand the enterprise at the helm maximises the chance of a successful rescue. Creditors are protected not by seizing control of the company but by a structure of disclosure, court supervision, creditor committees with consultative and negotiating roles, and the requirement that any plan satisfy detailed tests of fairness before it can be confirmed.

[15] *See* Douglas G. Baird and Thomas H. Jackson, *Cases, Problems, and Materials on Bankruptcy* (Little, Brown and Company, Boston, 1985).
[16] Roy Goode, *Principles of Corporate Insolvency Law* (Sweet and Maxwell, London, 4th edn., 2011).
[17] United States Bankruptcy Code, 11 U.S.C., ss. 1101, 1107 and 1108.

The contrast with India is instructive precisely because it isolates the trade off. The Indian system distrusts the defaulting management and therefore removes it, accepting the loss of the management's knowledge and continuity as the price of preventing abuse. The American system trusts the management to remain, accepting the risk of self dealing and entrenchment as the price of preserving the going concern. Neither choice is costless. Each buys one thing by giving up another. The Indian choice buys integrity and creditor confidence at the cost of business continuity and promoter knowledge. The American choice buys continuity and rescue potential at the cost of a real risk that the people who caused the failure will mismanage the recovery.

It would be a mistake to romanticise Chapter 11. It is expensive, it is litigation heavy, it has been criticised for allowing entrenched management to use the process strategically, and its protections work better for large, well advised corporations than for small businesses. The United States itself recognised these limits and created a streamlined subchapter for small business debtors precisely because the full debtor in possession machinery was too costly and cumbersome for smaller firms.[18] The lesson for India is not that the American model is better. It is that the displacement of management is a choice with a price tag, and that a system can choose differently and survive.

B. The middle path: rescue culture in the United Kingdom

The United Kingdom occupies a position between the two poles, and its trajectory is more useful to India than a static snapshot would be. For much of its modern history British insolvency practice was dominated by procedures in which a secured creditor, through the device of receivership, could effectively control the fate of a distressed company in its own interest. Reforms over the past two decades have steadily shifted the centre of gravity. The administration procedure was reformed to require the administrator to act in the interest of the creditors as a whole rather than a single secured creditor, and to pursue, as a first objective, the rescue of the company as a going concern.[19]

More recently the United Kingdom introduced a restructuring plan procedure that allows a company, with court sanction, to bind dissenting classes of creditors to a plan if certain conditions are met, a mechanism often described as cross class cram down.[20] This is significant for India because it represents a tool for overcoming creditor holdout without

[18] Small Business Reorganization Act of 2019, Pub. L. No. 116-54, introducing Subchapter V of Chapter 11 of the United States Bankruptcy Code.
[19] Enterprise Act 2002 (UK), inserting Schedule B1 into the Insolvency Act 1986 (UK).
[20] Corporate Insolvency and Governance Act 2020 (UK), inserting Part 26A into the Companies Act 2006 (UK).

simply handing control to whichever creditor class is largest. The court, not the dominant creditor, is the ultimate guarantor that dissenting classes are treated fairly. The British system has thus tried to capture the benefits of a structured, creditor sensitive process while retaining a strong judicial check and a genuine orientation toward rescue.

The British experience suggests that creditor influence and a rescue orientation are not mutually exclusive, and that the design problem is not whether creditors should have power but how that power should be channelled and checked. India's model channels it through a value weighted committee whose commercial wisdom is largely insulated from judicial review. The British model channels it through procedures that keep the court in a meaningful supervisory role. The difference in where the ultimate check sits is the difference that matters.

C. What the comparison does to the argument

The comparison is not offered here as a tour of foreign systems. It does specific work for the central claim of this paper. The claim is that the Indian model has redefined success against liquidation value, and the comparison shows that this redefinition is a choice rather than a necessity, because other systems refuse to make it. The American system measures success against the survival of the enterprise as a going concern, which is why it leaves management in place to fight for that survival. The British system measures success against a statutory hierarchy of objectives in which the rescue of the company comes first and a mere better than liquidation return comes last, and it puts a court in charge of holding the process to that hierarchy. Both systems keep the goal, the going concern, at the centre of the measure of success. India alone has allowed the floor, liquidation value, to migrate to the centre.

Set side by side, the three systems map a spectrum. At one end stands the United States, leaving control with the debtor's management and measuring success by survival. At the other stands India, stripping management of control, vesting it in a creditor committee, and increasingly measuring success by the margin over liquidation. The United Kingdom sits in between, with creditor influence tempered by judicial supervision and a statutory rescue preference that keeps the goal in view. India did not reach its position by ignoring the alternatives. It reached it by reacting against a domestic history in which leaving control with management had failed catastrophically. The comparison does not show that India chose wrongly to distrust management. It shows that distrusting management and abandoning the rescue benchmark are two separate choices, and that India, having made the first for good reasons, has drifted into the second without ever quite admitting it.

V. THE 2025 AMENDMENTS AND THE QUIET

CONVERGENCE

A. The largest overhaul since 2016

The Insolvency and Bankruptcy Code (Amendment) Bill, 2025 represents the most substantial revision of the Code since it came into force, and it is the clearest evidence yet that the discontents of creditor control have become the law's own reform agenda.[21] The Bill addresses several of the strains identified above at once. It tightens timelines, including a defined period for admission of applications and for approval of resolution plans, in an effort to restore the discipline that practice had eroded. It introduces a framework for group insolvency and signals a framework for cross border insolvency aligned with international practice. And, most significantly for the argument of this paper, it introduces a new creditor initiated insolvency resolution process to sit alongside the existing process.

B. A limited debtor in possession arrives

The detail that deserves the most attention is the description of the new creditor initiated process as operating on a debtor in possession with creditor in control basis. In the new process the existing management may, in defined circumstances, remain in possession of the business while the creditors retain ultimate control over the resolution.[22] This is a deliberate softening of the pure displacement model. It is an acknowledgment, written into the statute itself, that removing management entirely carries costs in continuity and value that the system can no longer simply absorb. India has, in other words, begun to import a controlled dose of the very debtor in possession idea that its original model was built to reject.

It would overstate the matter to call this a wholesale conversion to the American approach. The creditors retain control. The promoter disqualifications are not swept away. The committee of creditors remains central. What has changed is that the binary has softened. Where the original Code knew only displacement, the amended Code admits a category in which management can stay in possession under creditor oversight. That is a hybrid, and it is a hybrid that moves India along the spectrum away from its own extreme pole and toward the middle ground occupied by the United Kingdom and, in a different way, by the American small business model.

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[21] The Insolvency and Bankruptcy Code (Amendment) Bill, 2025. For an overview of the proposed changes see Ministry of Corporate Affairs, *Invitation of Comments on Changes Being Considered to the Insolvency and Bankruptcy Code, 2016* (Jan. 18, 2023).

[22] *Id.* The creditor initiated process is described as operating on a debtor in possession with creditor in control basis.

C. The cross border gap and its closing

A separate but related strain has been the near total absence of a developed framework for cross border insolvency. For most of the Code's life the statutory provisions addressing foreign elements have been skeletal, consisting of enabling sections that contemplated reciprocal arrangements with other countries but were never operationalised through the necessary agreements.[23] The practical consequence was visible in cases such as the airline insolvency in which proceedings ran simultaneously in India and the Netherlands, and the Indian tribunal had to improvise cooperation with the foreign administrator in the absence of a governing framework.

India has long been advised, by its own expert committees, to adopt the UNCITRAL Model Law on Cross Border Insolvency, which provides a tested structure for recognising foreign proceedings, coordinating between jurisdictions, and granting relief to foreign representatives.[24] The 2025 reform signals movement toward adopting such a framework. This too is a form of convergence, this time with international rather than domestic comparators, and it reinforces the broader pattern: the Indian system is steadily abandoning its early isolation and exceptionalism in favour of internationally tested designs.

The airline insolvency referred to above remains the leading Indian illustration of cross border coordination achieved without a governing statute.[25]

D. Reading the direction of travel

Taken together, the 2025 amendments tell a consistent story. The pure creditor control model, having been tested for nearly a decade, has revealed costs serious enough to prompt the legislature to soften it. The softening is partial and cautious. Creditors remain in control. But the absolutism of the early design, the automatic displacement of management, the rigid binary between resolution and liquidation, the indifference to international coordination, is giving way to something more textured. The discontents this paper has described are not the complaints of outside critics. They are the problems the legislature itself has now chosen to address. That is the strongest possible evidence that they were real.

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[23] The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), ss. 234 and 235.
[24] United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency* (1997); Insolvency Law Committee, *Report on Cross-Border Insolvency* (Ministry of Corporate Affairs, 2018).
[25] *State Bank of India v. Jet Airways (India) Limited*, Company Appeal (AT) (Insolvency) No. 707 of 2019 (NCLAT).

VI. CREDITOR CONTROL UNDER STRESS: THE HARDER QUESTIONS

The account so far has described the architecture, the record, and the comparative setting of creditor control. A serious treatment must also confront the harder questions that defenders of the model raise, because a critique that ignores the strongest version of the opposing case is not worth much. Five such questions deserve direct engagement: whether the high liquidation rate is really a failure, whether the commercial wisdom doctrine has gone too far, whether Section 29A can be defended on its own terms, whether the operational creditor grievance is as serious as it first appears, and finally the one objection this paper cannot fully answer.

A. Is liquidation really a failure?

The instinct to treat every liquidation as a defeat for the system should be resisted. Many companies that enter the process are not viable as going concerns. They are worth more dead than alive, in the blunt language of the field, because their assets can be redeployed more productively elsewhere. For such companies, a swift liquidation that frees up capital and assets is not a failure of the rescue ideal. It is the rational outcome, and a system that kept hopeless companies on life support in the name of rescue would destroy value rather than preserve it. To this extent the defender of creditor control has a strong point. The committee's willingness to choose liquidation where resolution is hopeless is a feature, not a bug.

The difficulty is that this defence proves less than it claims. It justifies liquidation for genuinely unviable firms. It does not justify liquidation for viable firms whose secured creditors simply prefer the certainty of a quick payout to the higher but riskier return of a going concern sale. The model gives the secured creditor the power to make that choice, and the secured creditor's private interest and the social interest in preserving viable enterprise do not always coincide. The honest conclusion is that some liquidations are efficient and some are not, and that the creditor control model contains no mechanism for distinguishing between them other than the self interest of the dominant creditor. That is the precise point at which the British insistence on judicial supervision of the rescue objective begins to look attractive.

B. Has commercial wisdom become an excuse?

The doctrine that the commercial wisdom of the committee of creditors is non justiciable began as a sensible principle. Courts are not equipped to second guess the business judgment of those whose money is at stake, and a process that invited the tribunal to re evaluate every commercial

decision would collapse into precisely the delay the Code was meant to end. The principle, established in K. Sashidhar and consolidated in Essar Steel, is therefore defensible in its core.[26] The trouble is that a principle of deference, once established, tends to expand to fill the space available to it. Commercial wisdom has at times been invoked to insulate not merely genuine business judgments but also decisions that distribute value unfairly among stakeholders or that ignore the interests of those without a vote.

Essar Steel itself drew a boundary, holding that the committee's discretion must be exercised within the four corners of the Code and that operational creditors must receive fair and equitable treatment.[27] That boundary is real but thin. The practical reality is that a doctrine designed to prevent courts from micromanaging business decisions has become, in some hands, a shield against any scrutiny at all. The lesson is not that commercial wisdom should be abandoned. It is that deference without any floor of fairness is deference that has forgotten its own justification. A model that places this much power in a creditor committee needs a clearer and more enforceable set of limits on how that power may be used against those who cannot vote.

C. Can Section 29A be defended on its own terms?

Section 29A is the sharpest expression of creditor control and also the most contested.[28] Its defenders make a powerful argument. The provision exists to prevent a specific and real abuse: the spectacle of a promoter who has driven a company into default buying it back through the resolution process at a steep discount, shedding the debt while keeping the business, and leaving the lenders to absorb the loss. In a credit culture where default had long carried no real consequence for those in control, a rule that denies the defaulting promoter a route back to ownership is not arbitrary. It is a deliberate attempt to change behaviour by raising the cost of failure.

The critique is not that this purpose is illegitimate but that the provision pursues it with a bluntness that destroys value. Section 29A does not distinguish between the dishonest promoter who looted the company and the honest promoter who was overtaken by a market downturn or a sectoral shock. It treats both alike, barring them from the process regardless of fault. In a country where promoter knowledge is often the single most valuable and least transferable asset of a closely held business, excluding every promoter to catch the guilty ones imposes a heavy cost on the many to deter the few. A more calibrated provision,

[26] *Supra* note 1; *supra* note 2.
[27] *Supra* note 2.
[28] *Supra* note 3.

one that distinguished culpable from blameless default, would serve the same anti abuse purpose at a far lower cost in lost value and lost rescue potential. The blunt version is defensible as a first generation rule written in a hurry to stop an urgent abuse. It is harder to defend as a permanent feature of a mature system.

D. How serious is the operational creditor grievance?

The exclusion of operational creditors from the committee survived constitutional challenge in Swiss Ribbons, and the reasoning of the Court is not easily dismissed.[29] Operational creditors are numerous, dispersed, and individually small. Giving each a vote would fragment the decision making body and invite the kind of holdout and delay that destroys value. There is a genuine efficiency argument for concentrating decision making in the financial creditors, who are fewer, better informed, and more capable of assessing a restructuring. The grievance, on this view, is the unavoidable cost of a workable process.

Yet the efficiency argument explains why operational creditors do not vote. It does not explain why they so often recover so little. These are distinct questions. A system could exclude operational creditors from the decision making body while still guaranteeing them a meaningful minimum recovery, protecting them through the substantive distribution rules even as it denies them procedural voice. The Indian model has been slow to develop that substantive protection, and the result is a class of creditors who are excluded from the decision and frequently left with very little by it. The fairness objection therefore survives the constitutional holding. The question is not whether the classification is rational, which it is, but whether a process that concentrates this much power in one creditor class owes a stronger substantive duty to the class it excludes. The better answer is that it does.

E. The objection this paper cannot fully answer

Intellectual honesty requires ending this Part with the objection that does the most damage to its own thesis, rather than the ones it can comfortably defeat. The objection is this. The claim that India has redefined success downward assumes there was a higher standard genuinely available to it. But perhaps there was not. Perhaps, given the state of Indian corporate balance sheets at the point of default, the depth of the distress, the years of value erosion under the prior regime before a case ever reached the tribunal, and the thinness of the market for distressed assets, a thirty three percent recovery is close to the most that any system could have achieved on the same companies. On this view the liquidation value benchmark is not a moved goalpost at all. It is an honest

[29] *Supra* note 9.

acknowledgment of how little was left to save, and the rescue benchmark was never realistic for the cases the Code actually receives.

This objection cannot be dismissed, and this paper does not pretend to refute it conclusively, because doing so would require a counterfactual that the data cannot supply. We cannot observe what the same companies would have recovered under a debtor in possession regime, because they did not pass through one. What can be said is narrower but still meaningful. First, the objection concedes the central point even as it resists it, because it accepts that the rescue ideal is largely unattainable for the Code's actual caseload, which is itself an admission that the Code does not deliver what it promised. Second, the comparison retains force at the level of design even if the recovery numbers are partly fixed by the underlying distress, because the timeline, the treatment of operational creditors, and the tilt toward liquidation are features of how India structured the process, not of how sick the companies were. A system cannot blame the patient for the length of the queue outside the operating theatre. The honest conclusion is that the recovery figure is overdetermined, shaped both by genuine pre existing distress and by the design choices of the model, and that the defenders of creditor control are too quick to attribute all of it to the former and none to the latter.

VII. CONCLUSION

The Insolvency and Bankruptcy Code, 2016 made a clear and defensible choice. Faced with a history in which leaving control with defaulting management had produced ruin, it placed control in the hands of creditors and pushed management aside. That choice solved a real problem. It ended the era in which a promoter could sit on a dying company indefinitely while creditors waited in vain.

But the choice carried a cost that the official defence of the Code works hard to obscure. Creditors recover about a third of what they are owed, the process takes about twice as long as the law allows, and liquidation rather than rescue is the most common destination. The model answers this record by pointing to the one number on which it shines, recovery measured against liquidation value, and that number, impressive as it looks, is the measure of a system that has quietly lowered its own bar. A regime conceived to rescue viable enterprise now grades itself against the scrap value of the businesses it processes. That is the central discontent of creditor control, and it is not a marginal complaint. It goes to what the system thinks it is for.

The comparison with the United States and the United Kingdom shows that this redefinition of success was avoidable. Distrusting management, as India rightly did, did not require abandoning the rescue benchmark, as India quietly has. The American model keeps the going concern at the

centre of its measure of success by leaving management in place. The British model keeps it there through a statutory hierarchy of objectives enforced by a court. India removed management for good reasons and then, without ever deciding to, let liquidation value become the standard against which it judged itself.

The most telling evidence that these criticisms are sound is that the legislature has now adopted them. The Insolvency and Bankruptcy Code (Amendment) Bill, 2025 tightens the timelines that practice had allowed to collapse, moves toward the cross border framework the system had long lacked, and, most significantly, admits for the first time a category in which management may remain in possession under creditor oversight. Each of these changes answers one of the discontents set out in this paper. The reform is partial and cautious, and creditors remain firmly in control. But the direction is unmistakable. India is moving back from the extreme pole it occupied toward the middle ground its comparators never left. The hard question for the next decade is whether the emerging hybrid can keep the discipline that creditor control undoubtedly brought while recovering the rescue ambition that the original model, for all its virtues, quietly bargained away.

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