ABSENTEEISM IN VOTING: AN OXYMORON

- ***Nitu Poddar***

Editor's Note: *Resolution plans are to be approved by CoC by a requisite majority.Now, a creditor who is a member of CoC may or may not be present in the meeting. Even if present, the creditor may simply 'abstain' from voting on the resolution. Given such practical scenarios, the manner in which the percentage of votes in favour of a particular resolution is calculated and more importantly, treatment of those creditors, who abstain from voting, do not vote at all, and its impact on the insolvency process and steps to be taken by the Resolution Professional have been discussed in the note below:*

This note deals with the question whether, in determination of the assent at a Committee of Creditors in resolution proceedings, the votes of such creditors who (a) do not vote at all, at an electronic voting; or (b) abstain from voting at the meeting itself [collectively referred to as "abstaining creditors"] will be considered while computing the voting strength of 75%[28] required. The relevant provision of law for this purpose is sec. 21 (8) of the Code which provides as follows:

All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five per cent of voting share of the financial creditors: "voting share" has been defined in sec. 5 (28) as follows: (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.

Assuming that the total number of voting shares, based on financial debt availed by the corporate debtor is Rs 100, and at a meeting, creditors holding financial debt of Rs 20 decides to abstain from voting, and out of the remaining Rs 80, creditors holding financial debt worth Rs 70 assent, whereas those holding financial debt worth Rs 10 oppose, is the decision passed with not less than 75% voting share? The answer will be affirmative, if we consider total voting share of Rs 80 who decided to cast votes, and the answer will be negative if we consider the total number of votes, including those who were undecided, or decided to remain undecided, that is, Rs 100.

The situation of abstaining financial creditors forms a substantial reality in CoC meetings. Very often, an officer of a bank or financial creditor comes to the meeting, and decides to abstain from voting, and commonly specifically writes on the ballot paper: "Abstain from voting since HO instructions not received", or the like. It is quite commonplace practice that no matter which officer comes to the meeting, the voting at the meeting is often at the directives of "senior management" or "HO", and if the officer attending the meeting has not got his HO consent, we will mostly abstain.

[28] *The article has been contributed prior to the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, effective from 6th June, 2018, and as such, readers are requested to read the same in line with the following amendment:*

> *The minimum voting percentage required by CoC has been reduced from 75% to 66% for substantial decisions like approval of Resolution Plan, replacement or removal of Resolution Professional etc., whereas, the minimum threshold for routine matters has been reduced to 51%.*

Absenteeism in Voting: An Oxymoron

The process of decision-making at CoCs very often involves existential question – the very survival of the corporate debtor depends on whether the CoC has decided to pass a resolution plan, or has failed to do so. Hence, the question becomes critical – can a member, who decides not to vote at all, and therefore, have no view on a matter whatsoever, may be counted at par with a person who has explicitly expressed a negative view?

There are 5 perspectives from which we will try to attempt this critical question:

- General rationale of collective decision-making
- Law of meetings, as settled over decades of authorities and rulings
- Notes of the BLRC
- Amendments to CIRP Regulations
- Decisions, or indecision, as available from NCLT rulings

General rationale of collective decision-making

After all, the CoC is a collective decision-making forum. The law insists on a super-majority for decision-making. A decision has two takes – a positive take, and a negative take. No collective decision-making process may force a person to decide. A person may not want to decide, or may remain indecisive. A person may simply absent from the decision-making process.

The process of counting majority or supermajority is a process of assimilating views expressed on a matter. If there is no view expressed, or a member does not come forward to vote at all, the same cannot be equated with a negative view. Therefore, the required super-majority has to be computed based on votes cast. This seems to be the intuitive rationale of collective decision-making.

General Law of voting

Over several years now the general law of voting is that members express their views by either voting in favour of a resolution or against the resolution. There can also be members who do not express their views at all; either by a) not attending the meeting, or b) by attending but not voting or abstaining to vote at the meeting.

The members who do not express their views are considered to be indecisive, and, therefore, by implication, have decided to follow the decision of the majority.

So, to count votes and to arrive at a conclusion on whether or not an agenda is resolved at the meeting, the votes in favour and the votes against are weighed and the majority is counted by finding the proportion of the votes cast in favour to the votes cast against. In no circumstance, the invalid votes or votes not cast at all are counted to calculate the majority.

According to ***Black's Law Dictionary (8th edition)***, *"simple majority" means "a majority of the members who vote, a quorum being present, disregarding absent members, members who are present but do not vote, blanks, and abstentions". "Majority rule" means, among others, "governance by the majority of those who actually participate, regardless of the number entitled to participate". According to the same dictionary, "abstention" means "the act of withholding or keeping back (something or oneself); especially the withholding of a vote"*.

According to ***Guide for Meetings and Organisations, N E Renton, 7th ed. volume 2, para. 12.101,*** *"Unless otherwise stated, "majority" means a majority of those actually voting either "yes" or "no" (a phase sometimes need in this context is "present and voting"). The term does not refer to: (1) a majority of the quorum (provided that, in the case of a meeting, a quorum is present); (2) a majority of those present (which might include abstainers); (3) a majority of the total membership. If concepts such as these are desired, then they must be explicitly spelt out in the organisation's constitution."*

In ***Shackleton on the Law and Practice of Meetings***, Chapter 15 deals with the Members' Meetings and Resolutions. The commentary observes that *"abstainers will not count; in other words, if an ordinary resolution is put to the vote and six vote in favour, five vote against, and 12 abstain, the resolution is carried."*

On reading of section 189 of Companies Act, 1956 and section 114 of Companies Act, 2013, it is clear that the same law has also been part of Corporate Laws over decades now.

The ones present and abstaining from voting are surely counted towards quorum for the meeting but not added in the denominator to count the percentage of "yes" votes as against the "no" votes. Mere presence in the meeting does not amount to participation and taking decision unless the same is done by exercising the voting rights.

The *High Court of Gujarat in In re: Arvind Mills Ltd.27*, has held that a bare attempt to vote by depositing blank ballot containing any writing is not effective and cannot be included in the total count. Only those ballots that express voters preference can be counted. The requirement contemplates only two preferences: one affirmative and the other negative. To adopt any other rule would be to say that three ballots were contemplated-- one affirmative, one negative, and another neither affirmative nor negative but forming a new class into which all ballots void for any reason must go.

In the matter of *Kirloskar Electric Co. Ltd., High Court of Karnataka,* held that a member present and voting may remain neutral, indifferent, unbiased, or impartial- not engaged on either side. One is not supposed to write anything except putting 'yes' or 'no' either in favour of or against the proposition. A vote cast without indicating the mind of the voter either for or against the resolution is no voting at all. So, in construing whether a resolution is passed by three- fourths majority present and voting, what is to be considered in calculating the majority is not the number of persons present and voting, but the number of valid votes polled in such meeting. The number of valid votes includes only votes indicating the mind of the voter for or against the resolution.

The aforesaid Order of Karnataka HC was for a section 391 matter of Companies Act, 1956. It may be noted that the proceedings under sec. 391 also involve compromises or arrangement, akin to resolution proceedings under the Code. This ruling was reiterated and referred in further matters as well.

Accordingly, the member who abstains from voting has neither decides to cast his vote in favour of the motion nor against the resolution and therefore one cannot invoke the principle that silence amounts to acquiescence in favour of the motion. Such abstaining member is not counted for voting at all – neither in the numerator nor in the denominator.

Voting in context of IBC

Voting in IBC is no different and the above rule also applies in calculating the voting of the CoC. There are instances of indecisiveness in CoC Meetings also more so when bankers are generally the majority members in the CoC. In the absence of requisite approval / mandate from their seniors / heads, bankers abstain from voting quite often. In such a scenario, to decide whether the resolution is through or not by requisite votes in favour, the members who abstain from voting are excluded from the count and consequently, the votes are counted out of the total no of votes received, i.e to say the votes cast in favour or against.

A careful reading of sec. 5 (28) of IBC will reveal that the definition is using two terms – voting share, and voting right. It defines a voting share to mean a voting right, based on financial debt, etc. As evident, a financial creditor gets the right to vote based on the financial debt. That voting right is converted into a vote by actual exercise of the voting rights. The voting rights of the votes cast are pooled together, and then, one determines the voting shares that have approved the proposal, versus those who rejected. A "right" has to be exercised to become a voting share. One cannot, without exercising the right, exercise it by implication. Where a member abstains from voting, such member is in a state of indecisiveness and therefore choose not to exercise his right to vote. His voting right is neither here nor there. As a result, since he cannot decide for himself, he chooses to go ahead with the required majority.

It is pertinent to note that pursuant to the IBBI (IRP-CP) Fourth Amendment Regulations, 2017 notified on 31.12.2017, the definition of dissenting shareholders was amended to include a financial creditors who abstained from voting for a resolution plan, approved by the committee.

The amended text is reproduced for easy reference:

> Regulation 2(1)(f) "*dissenting financial creditor" means a financial creditor who voted against the resolution plan or abstained from voting for the resolution plan, approved by the committee;"*[29]

Post this amendment, there remains no doubt in the matter. Notably, the term "dissenting financial creditors" is used only once in the entire Regulations (in Reg no 38(1)(c)) wherein it is mentioned to provide the liquidation value due to the dissenting financial creditors.

Had it been intended by the lawmakers to consider the members abstained from voting equal to the ones who voted against the resolution, the same would have been done by them. Noting stopped the legislature to make such amendment in the Code itself so as to make such definition universal Code-wide. The lawmakers have conspicuously amended the definition only in the IRP-CP Regulations to add such intent only in case of allocating liquidation value.

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Until the aforesaid amendment was rolled out, the abstaining members were not included in the ones dissenting and therefore this explicit addition was done in the definition of dissenting financial creditors.

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The Hon'ble Supreme Court in the matter of K. Sashidhar v. Indian Overseas Bank *held that where the dissenting financial creditors have not voted in favour of the resolution plan, solely for commercial reasons, there arose no need to record reasons for such disapproval. It was further observed that the Code does not empower the AA to judge the commercial decisions of the CoC, be it approving or dissenting the resolution plan or abstaining to vote at all. Even inquiry before the Appellate Authority is limited to the grounds under Section 61(3) of the Code.*