

Maximize Gains in Real Estate Resolutions with Project-Wise CIRP



*Under the IBC processes, the challenges of corporate persons are unique to their concerned sectors that require specific solutions. Hence, one size fits all may not be sufficient to address a variety of issues being faced on the ground in resolving corporate debtors of different sectors. In this context, the Real Estate Sector, which is of great public concern, is under constant review for evolving better framework including judicial innovation of Project-Wise CIRP. In this article the author has presented a detailed analysis of Project-Wise CIRP in the light of developing jurisprudence and initiatives of the IBBI. He has also presented pros and cons of Project-Wise CIRP and the need for amendments in the insolvency framework. **Read on to know more...***



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1. Background

The term ‘Project Wise CIRP’ originated to address specific challenges faced by companies of the Real Estate Sector undergoing Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016 (IBC). The primary reason for stress in real estate projects is the lack of financial viability of the projects undertaken by the real estate companies. Initially real estate companies were brought into CIRP by the financial or operational creditors but later on in the case of Jaypee Infratech Ltd and also *Pioneer urban Land and Infrastructure Limited vs. Union of India*¹, the home buyers (allotees) in a real estate project of the companies were brought into the purview of definition of financial creditor under Section 5(8) of the IBC.

As per the Quarterly Newsletter² for July-September, 2023 of Insolvency and Bankruptcy Board of India (IBBI), the Real Estate Sector contributes to about 21% of the cases of CIRP admission, which is the second highest after the manufacturing sector that contributes

¹ Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416.

² IBBI Quarterly Newsletter for July – September 2023. <https://ibbi.gov.in/uploads/publication/b4ce3516920836e9ff9b1e816137bf97.pdf>

38%. However, only 15% of the Real Estate Sector companies are resolved through resolution plans while 18% resulted in liquidation, and 26% cases were settled through withdrawal, which is also very high. These statistics suggest that companies in the Real Estate Sector, once admitted into insolvency, are more likely to opt for liquidation or withdrawal rather than a successful resolution, as resolving them is not as easy as resolving other companies that have fallen under insolvency or requires some other approaches.

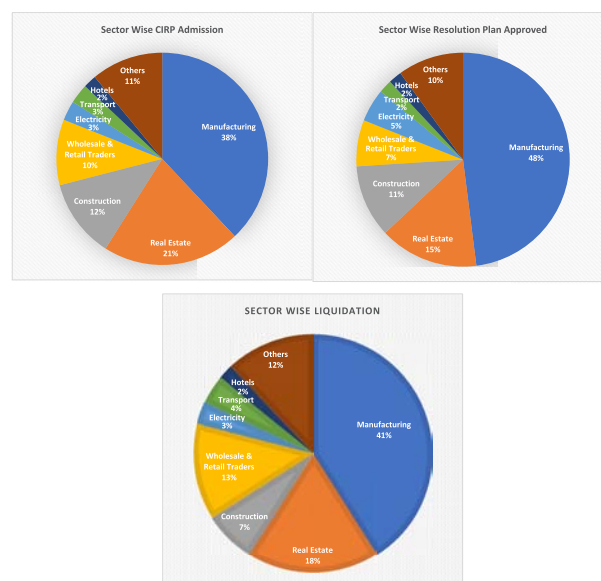
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Recently the Indian Banks' Association (IBA) conducted an analysis indicating that 4.12 lakh distressed dwelling units, valued at ₹4.08 lakh crore, are impacted in these stalled real estate projects. Among these, 2.40 lakh distressed dwelling units are located in the National Capital Region (NCR). If 75% of these distressed units are successfully resolved, it could result in an additional three lakh units for the housing sector. This resolution would assist the middle and lower middle class in obtaining housing for which they have already made a significant payment. Moreover, it would provide a significant boost to economic activity and growth.³

In CIRP, promoter's interference is nearly eliminated, and Interim Resolution Professional (IRP)/ Resolution Professional (RP) steps into the shoes of the promoter/directors of the company. S/he is assigned the responsibility to take care of the operations of the company and the conduct of CIRP simultaneously, which would be otherwise a burdensome affair. Under this process, the design of the IBC favors banks and financial institutions rather than the homebuyers who have invested their lifetime savings into the real estate project. Hence, CIRP has not seen much success in achieving a satisfactory resolution in the real estate sector. This gap has resulted in unresolved issues for homebuyers. Addressing these issues would benefit not only the homebuyers but also other stakeholders and could help in completing stalled projects.

³ Amitabh Kant's Committee Report on Real-Estate projects

⁴ *Flat Buyers Association Winter Hills-77 v. Umang Realtech Pvt. Ltd. through IRP and Others*, - [2020] ibclaw.in 166 NCLAT



In a rare case, the Appellate Authority (NCLAT) felt that it may not be possible to resolve a real estate company under insolvency by following the CIRP as laid down in the IBC. This is because the IBC benefits only institutional secured lenders as much compared to other types of financial creditors, whereas in real estate companies, homebuyers are not considered as 'secured creditor' because the projects are funded by some financial institutions/ service providers that come under the category of 'secured creditor'. Hence it has come up with a novel concept called "Reverse CIRP" through judgement in *Flat Buyers Association Winter Hills-77 vs. Umang Realtech Pvt. Ltd. through IRP and Others*⁴.

Reverse CIRP is a form as similar to that of the normal CIRP, wherein the company's promoter/s is allowed to fund projects as an external lender (with protection as available to interim finance provider under the IBC) and helps the RP in completing the project while remaining outside of the process. It is a more controversial one to let the promoter again to involve in managing and finishing the project of the company, but considering the objective and beneficial interest of the homebuyers this collaboration and implementation is considered to be an amicable solution under resolving the company under IBC, even though it is apparently in the teeth of provision u/s 29A.

A further variant that has emerged is Project-Wise resolution and henceforth it shall be construed as Project-Wise CIRP. In the NCLAT judgment in *Flat Buyers*

Association Winter Hills-77 vs. Umang Realtech Pvt. Ltd. through IRP and Others, the competent authority has first time adopted the concept of “Project Wise CIRP”. This concept was introduced because each allottee of the project may have different concerns and may vary from project to project, hence bringing all the projects carried over by the company into an umbrella CIRP would not be feasible and viable, and this may affect the purpose of the IBC altogether.

Project Wise CIRP both have advantages and disadvantages. In recent judgments, including *Union Bank of India and Indiabulls Asset Reconstruction Company Ltd vs Ram Kishore Arora & Ors*⁵, the Supreme Court upheld NCLAT’s decision to convert CIRP against Supertech Ltd (CD) into Project Wise CIRP.

It is worth noting that the Reverse CIRP is a rarely used process that only a few judges in the NCLT recognize. Even now, policy makers have not given it much consideration, as evidenced by the recent discussion papers from the IBBI, that are focused on Project-Wise CIRP rather than the Reverse CIRP.

It is important to keep in mind that the reverse CIRP is an exceptional measure that can only be utilized in rare cases where the project is solvent, but the IBC has been invoked due to various other reasons. However, if insolvency has arisen due to the subject project itself, the possibility of implementing a reverse CIRP is highly unlikely.

In most cases, the cost to completion will exceed the balance amount realizable from home buyers. As a result, no one will come forward to fund the gap, as it is non-recoverable. Hence Reverse CIRP is not possible in such cases.

For a decision to be made on whether to consider Project Wise CIRP, the default should be specific to a particular project and other projects should be financially stable enough to be maintained as ongoing projects. To better understand this, let’s examine the case of *Ram Kishor Arora Suspended Director of M/s. Supertech Ltd. vs. Union Bank of India & Anr*⁶, where the Union Bank of India filed a Section 7 application against Supertech Limited (Corporate Debtor) and it was admitted by the Adjudicating Authority. The Corporate Debtor is in the

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real estate business and has several projects in NCR. The Union Bank of India filed for insolvency because of a default by the Corporate Debtor with regard to the “ECO Village II Project”. The promoters of the Corporate Debtor filed an appeal against the initiation of CIRP with the Appellate Authority which found that the Corporate Debtor was involved in 20 projects, all of which were going well and had sold a substantial number of units. However, there was a default with regard to the “ECO Village II Project” alone. A large number of homebuyers who filed an Intervention Application (IA) requested that the CIRP be confined to the “ECO Village II Project” only. With regard to the other projects, construction may be allowed to continue so that homebuyers can receive their flats. After hearing the IA and Appeal Application, the NCLAT decided that conducting CIRP on the Corporate Debtor as a whole may affect other feasible and solvent projects where the majority of units are sold and could also potentially affect homebuyers. Instead, they suggested starting a Project-Wise Resolution as a test to see its success. All other ongoing projects can continue construction under the overall supervision of the RP with the assistance of the ex-management and its employees and workmen. However, the “ECO Village II Project” has been directed to undergo “Project Wise Resolution”. This means that CIRP will only pertain to this particular project, and a Committee of Creditors (CoC) will be formed under Section 21 of the IBC with all Financial Creditors, including Financial Creditors/Banks/Home Buyers of the “ECO Village II Project” only.

The case mentioned above highlights the importance of implementing Project Wise CIRP. However, in another case involving *N. Kumar RP of M/s. Sheltrex Developers Pvt. Ltd. vs. M/s. Tata Capital Housing Finance Ltd*⁷, the Chennai Bench of the NCLT ruled against previous judgments. It stated that the concept of Project Wise CIRP cannot be applied universally, and its application is dependent on the specific facts and circumstances of each case. Furthermore, the NCLT added that Project Wise CIRP is not covered by the IBC. But the Report⁸ of

⁵ *Indiabulls Asset Reconstruction Company Ltd. Vs. Ram Kishore Arora & Ors.* – (2023) ibclaw.in 68 SC

⁶ *Ram Kishor Arora Suspended Director of M/s. Supertech Ltd. Vs. Union Bank of India & Anr.* - (2022) ibclaw.in 455 NCLAT

⁷ *Mr. N. Kumar RP of M/s. Sheltrex Developers Pvt. Ltd. Vs. M/s. Tata Capital Housing Finance Ltd.* - (2022) ibclaw.in 329 NCLT

⁸ Amitabh Kant’s Committee Report on Real-Estate projects

Amitabh Kant Committee on real estate projects suggests that it is feasible to move forward with Project-Wise CIRP because all projects are mandatorily pre-registered with the Real Estate Regulatory Authority (RERA). As RERA registration is carried out on a project-wise basis, this approach can also be adopted under the IBC.

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In the case of *Whispering Tower Flat Owner Welfare Association vs. Abhay Narayan Manudhane, RP of Corporate Debtor- Housing Development and Infrastructure Limited and Ors*⁹, the NCLAT allowed for project-wise insolvency, even though the NCLT had previously rejected the idea. The CoC had divided the assets of the Corporate Debtor into eight projects for exploring project-wise resolution, and the NCLAT deemed this acceptable. The NCLT had previously rejected this resolution, believing that the CoC had only approved it due to pressure from homebuyers. The NCLAT gave the CoC a 90-day extension from the date of order to explore the project-wise resolution and decide.

The recent decisions made by the Supreme Court and the NCLAT have given priority to the interests of home buyers in the CIRP of real estate companies which is a significant development under the IBC and a step in the right direction as the objective of the IBC is resolution, not liquidation.

2. Whether Amendment in the IBC is required or not?

After reviewing the situation, we need to consider whether an amendment is necessary in the IBC framework for Project Wise CIRP? This is a complex question that is difficult to answer. The Ministry of Corporate Affairs (MCA) released a Discussion Paper on the proposed changes to the IBC on January 18, 2023. The paper, which was kept open for public comments and suggestions, contained a dedicated section for improving outcomes in real estate cases, as well as a discussion on proposals pertaining to Project Wise CIRP. The discussion paper had proposed several amendments

in the CIRP Regulations so as to allow the CoC and RP to move ahead with Project-Wise CIRP. The Amendments proposed were; Registration of Real Estate under Real Estate (Regulation and Development) Act 2016 [RERA] , Handing over possession which are complete or on an 'as is where is ',invite separate plans for each project'.

Based on the outcomes of judgements in the matters of *Supertech Limited* and *Housing Development and Infrastructure Limited*, wherein NCLAT has directed for Project-Wise CIRP, we can expect an amendment in law and framing of relevant regulations to address various situations that may arise, and the inherent problems associated with project wise CIRP. This would improve the CIRP and the enhance recovery. The Committee Report on Real Estate Projects, led by Amitabh Kant, and the Discussion Paper on Real Estate Sector dated November 6, 2023, have highlighted the fact that the current framework of CIRP is not conducive to address the issues specific to the real estate sector. A large number of real estate cases have remained unresolved for long periods of time. Therefore, the report suggests that a resolution mechanism tailored to address the needs of the real estate sector be specified with necessary variations from the CIRP. The new mechanism may include project-wise admission and resolution, delivery of completed houses to homebuyers during CIRP, and allowing homebuyers to become Resolution Applicants, among other things.

In cases related to real estate, corporate debtors (CDs) have multiple projects at different stages of construction. prospective resolution applicants (PRAs) are more likely to take over projects closer to completion, rather than those in early stages of construction. Sometimes, a default occurs in one specific project, while the other projects are on track, but the initiation of CIRP puts all the projects under duress. To address these issues, courts have attempted several experiments, including "Reverse CIRP" and "Project-Wise resolution". Therefore, there is a pressing need to have a separate resolution mechanism for the real estate sector, which is proposed to be "Project-Wise CIRP". Although the expert committee recommended this "Project-Wise CIRP", the IBBI, while releasing its discussion paper on November 06, 2023, did not consider this recommendation. Instead, they focused only on the registration of the real estate project, making it more transparent, accountable, and efficient. Projects registered under RERA enhance transparency and

⁹ Whispering Tower Flat Owner Welfare Association Vs. Abhay Narayan Manudhane, RP of Corporate Debtor and Ors. - (2022) ibclaw.in 05 NCLAT

accountability as per the norms of the RERA, which is a sector-specific legislation and can significantly improve the prospects of a successful resolution.

Project-Wise CIRP is a promising solution for resolving defaulted projects separately, which can lead to faster resolution and address the concerns of multiple stakeholders, including homebuyers.

In accordance with the recommendations of the expert committee and the pressing need to address ongoing insolvency cases in the real estate sector, it is imperative that an amendment be made to the IBC code, specifically the “Project-Wise CIRP”. This would serve to facilitate a more effective resolution of such cases, ensuring that the interests of all stakeholders are safeguarded. Before considering the amendment in the law regarding Project-Wise CIRP, it is necessary to examine the advantages and disadvantages of this proposal. The implementation of Project-Wise CIRP involves creating separate accounts for defaulted and non-defaulted projects and maintaining receivables accordingly. The RP supervises these accounts, and no account of the Corporate Debtor is allowed to be operated without the counter signature of the RP, which reduces the risk of siphoning of funds.

The Project-Wise CIRP is a promising solution for resolving defaulted projects separately, which can lead to faster resolution and address the concerns of multiple stakeholders, including homebuyers. However, various inherent issues are associated with this proposal.

Firstly, Project-Wise CIRP does not guarantee a successful resolution, especially if ongoing projects remain incomplete, or if the promoter fails to comply with the guidelines of Project-Wise CIRP. In such cases, the IRP would resort to regular CIRP, which is typically a longer process.

Secondly, Project-Wise CIRP permits promoters to infuse funds as interim finance for ongoing projects, thereby violating Section 29A of the IBC. This provision allows secured financial creditors to participate in the resolution process but is often discriminatory against homebuyers.

Lastly, homebuyers are typically ill-informed and do not have the expertise necessary to determine the financial viability of the plans and proposals. This can lead to further discrimination against “secured financial creditors”.

On February 15, 2024, IBBI made amendments to several CIRP regulations vide IBBI (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2024¹⁰. These amendments are made as per the recommendations of the Expert Committee Report and Discussion Paper on Real Estate Sector regarding operating separate bank accounts for each real estate project under Regulation 4D. Besides, clarification has been inserted into regulation 36A (1), stating that the RP may invite a Resolution Plan for each real estate project or group of projects of the Corporate Debtor after CoC’s approval. These changes were made for smoother functioning of Real Estate CIRPs and to resolve them effectively. *It may be noted that inviting a Resolution Plan for each project is quite different from ‘Project-Wise CIRP’.* Importantly, the Amendment in the CIRP Regulations on February 15, 2024 has dropped the amendments proposed in the Discussion Paper relating to Registration under RERA and handing over possession where the flats are complete or on an ‘as in were is’ basis. This clearly points out that IBBI has not considered the bigger picture which is recommended by the Amitabh Kant Expert Committee on Real Estate Projects when it comes to Real Estate CIRP.

If a Real Estate Corporate Debtor is facing financial stress, it may be due to one or two projects only, while the other projects may be functioning well. If such diversification is clear regarding Real Estate corporate debtors, it is better to go with Project Wise CIRP, i.e., the projects that lead to financial distress should be brought into the purview of the IBC and resolved individually, rather than pulling the entire real estate entity into insolvency, even though they are not facing distress.

Thus, to overcome the difficulties of bringing the entire real estate entity into the purview of IBC, it is necessary to introduce “Project Wise CIRP” into the IBC which is deliberated by the expert committee in their report. The amendment has the potential to facilitate easier resolution and benefit all stakeholders under the IBC, making it a promising solution for insolvency cases pertaining to the Real Estate Sector. Hence, we anticipate the formal amendment in the IBC to be accompanied by the necessary regulations that will ensure successful resolution and revival of real estate sector insolvencies.

¹⁰ <https://ibbi.gov.in/uploads/legalframework/88458173f47fbd03d775370a420f307.pdf>