

Empowering the Revival of the Real Estate Sector: The Transformative Impact of the Insolvency and Bankruptcy Code

[Vidushi Puri & Kandarp Jha](#)

Student at Post Graduate Insolvency Programme, IICA

Introduction

India's real estate sector accounts for about 7 percent share of the country's GDP. In the pursuit of the Amrit Kaal, every sector will contribute, with infrastructure development set to play a crucial role over the next 25 years as India is on the path to achieving the target of becoming a US\$30 trillion economy by 2047. Infrastructure is at the forefront of economic development in India. The government allocated 3.3% of the country's GDP towards the infrastructure sector in FY24. Considering the above data, it is important to have a sound insolvency regime in the embodiment of IBC to help rescue valuable firms that can immensely contribute to our economic development.

The IBC has imbibed some of the best international practices of an asset resolution mechanism. It provides an honourable exit mechanism for honest business failures and enables the release of credit locked into the stressed assets for better resource allocation. This market-driven, transparent resolution mechanism instills confidence in the financial system and attracts many new investors to invest in Indian businesses.

A significant achievement of the IBC has been the change brought in the debtor-creditor relationship. Simplification of regulatory frameworks through reforms such as the Insolvency and Bankruptcy Code (IBC) and the Real Estate (Regulation and Development) Act (RERA) have enhanced the ease of doing business.

Evolution of Homebuyers' Rights in Corporate Insolvency Proceedings

The Code initially lacked provisions addressing the rights of homebuyers against defaulting real estate developers. The incorporation of provisions concerning homebuyers in the Code evolved gradually through judicial interpretations. Initially, courts hesitated to classify homebuyers as creditors. For instance, in the case of Col. **Vinod Awasthy v. AMR Infrastructure Ltd.**^[1], the National Company Law Tribunal (NCLT) dismissed an application by a homebuyer to initiate Corporate Insolvency Resolution Process (CIRP) against a real estate company. The tribunal ruled that the homebuyer couldn't be considered an operational creditor since the claim was related to the delayed possession of a flat, not the provision of goods or services. The NCLT suggested seeking recourse under consumer protection laws instead of the Insolvency and Bankruptcy Code (the Code).

In the case of Jaypee Infratech^[2] and **Chitra Sharma and Ors, vs Union of India**^[3], the court observed that IBC does not contain an adequate recognition of the interest of home buyers in the resolution process who are the vital stakeholders. To find a suitable solution, the government constituted an Insolvency Law Committee (ILC) under the Chairmanship of Injeti Srinivas. The

Committee was of the view that non-inclusion of home buyers either in the category of financial creditors or operational creditors deprives them of some of their important rights, viz, right to initiate CIRP, right to be represented on the Committee of Creditors (CoC) and in case of liquidation of the CD, the guarantee of receiving at least the liquidation value.

Further, **the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016** initially provided the procedure for filing claim forms by the financial creditors and operational creditors only. Home buyers faced difficulties even in filing their claims as their claims came under the category 'other creditors'. When the plight of the home buyers came to the force, the Insolvency and Bankruptcy Board of India (IBBI) amended the Regulations with respect to forms for filing claims, to include the claims of 'other creditors'.

Responding to suggestions, the Ministry of Corporate Affairs established the Insolvency Law Committee in 2017 to enhance the efficiency of the insolvency framework. In its report, the committee recommended treating homebuyers as financial creditors under the Code, considering the financial nature of their contracts with real estate developers. Real estate companies contested this amendment, but the Supreme Court, in the case of **Pioneer Urban Land and Infrastructure Limited and Anr. V. Union of India** rejected the application of petitioners. This amendment clarified that homebuyers would be recognized as financial creditors under the Code, thus affirming their status and rights within the insolvency resolution process. Home buyers/allottees who give advances to the real estate developer and thereby finance the real estate project at hand are financial creditors.

Under the IBC, both operational and financial creditors are empowered to initiate insolvency proceedings against a corporate debtor. Financial creditors possess the authority to vote on the resolution of the company's insolvency and, if no resolution plan is available, on the liquidation of the company.

Exploring Innovative Approaches in Corporate Insolvency Resolution: A Blend of Practicality and Legal Precedent

Project-Wise Corporate Insolvency Resolution

The landscape of corporate insolvency resolution in India has witnessed significant evolution, particularly with the emergence of novel concepts like project-wise insolvency. Recent judicial pronouncements, exemplified by the Supreme Court's judgment in **Supertech Ltd.** and the earlier precedent set by **Vidarbha Industries v. Axis Bank Limited**^[4] ("Vidarbha"), have reshaped the contours of insolvency resolution, emphasizing a balance between practical utility and legal precedent.

On January 18th, 2023, the Government issued a paper proposing amendments to the IBC, aiming to mitigate the challenges faced by homebuyers embroiled in protracted legal disputes with real estate developers, resulting in delays in obtaining possession of their homes. A pivotal aspect of this proposal is the introduction of project-specific Corporate Insolvency Resolution. Under this innovative concept, if an application is lodged against a developer managing multiple projects, insolvency proceedings will be initiated exclusively for the particular project where the default occurred. The objective behind these proposed amendments is to expedite the resolution of stalled

projects, thereby augmenting the likelihood of successful resolution by concentrating on distressed assets within a specific project rather than the entire corporate entity.

Consequently, if an application is filed to commence corporate insolvency for a company overseeing multiple real estate projects, and the default pertains to one or more of these projects, the Adjudicating Authority retains the discretion to admit the case. Still, it applies the Corporate Insolvency Resolution Process (CIRP) provisions solely to the defaulted real estate projects. This approach treats these projects as distinct entities within the broader company for resolution purposes, as envisioned in the proposed amendments.

Embracing this approach offers two significant advantages. Firstly, by separately resolving stressed projects that led to the corporate debtor's insolvency, the company can focus on its other projects, ensuring the interests of relevant stakeholders, particularly the allottees of the specific project, are safeguarded. Secondly, this approach facilitates a tailored resolution plan aligned with the status of the real estate project and the specific objectives of relevant stakeholders, particularly the allottees of that particular project. This customized approach ensures that the resolution process is attuned to the unique requirements of each project and its stakeholders.

In conclusion, the evolution of project-wise insolvency and the emergence of innovative mechanisms like Reverse CIRP underscore the dynamic nature of corporate insolvency resolution in India. These developments, grounded in practical utility and fortified by legal precedent, represent a significant step forward in addressing the complexities of the insolvency landscape while safeguarding stakeholders' interests. However, challenges remain, particularly concerning legal compliance and the harmonization of innovative approaches with existing statutory provisions. Thus, while these developments mark a positive trajectory, continued vigilance and adaptation are essential to ensure the efficacy and integrity of the insolvency resolution process in India.

Reverse Corporate Insolvency Resolution

A recent judicial experimentation in this regard is the introduction of the "Reverse Corporate Insolvency Resolution Process (Reverse CIRP)" devised by the National Company Law Appellate Tribunal. This innovation was conceptualized to safeguard the interests of real estate project allottees, whose objective of obtaining possession of their units conflicted with the concerns of other financial creditors focused on debt repayment. Additionally, despite real estate allottees now being recognized as financial creditors, the tribunal noted their potential lack of commercial acumen in assessing the viability of a resolution plan. Recognizing this distinct position of homebuyers, the National Company Law Appellate Tribunal (NCLAT) introduced this novel approach.

The notion of reverse insolvency/CIRP was initially acknowledged by the NCLAT Delhi in the case of ***Flat Buyers Association Winter Hills vs Umang Realtech***.^[5] In this instance, the court sanctioned reverse CIRP, wherein one of the promoters consented to inject funds into the project in the capacity of a lender (financial creditor) to facilitate the project's timely completion as stipulated by the NCLAT. It was additionally mandated that failure by the 'promoter' to adhere to the aforementioned conditions or failure to cooperate with the Interim Resolution Professional would lead to the NCLT assuming responsibility for completing the CIRP of the corporate debtor.

The Honourable Supreme Court also affirmed the principle of reverse CIRP in the case of ***Anand***

Murti vs. Soni Infratech Private Limited.^[6] In this matter, the NCLAT dismissed the application for modification of the settlement by the promoter, which encompassed all the homebuyers omitted from the earlier settlement, and directed the continuation of the CIRP. However, the Supreme Court permitted the reverse CIRP, citing its benefits to allottees and the timely completion of the project. Moreover, the promoter submitted an affidavit committing to maintaining the flat costs without escalation, honouring the BBA signed by the previous management, promptly initiating the project without delay, and securing a Rs. 100 crore loan from SBI Cap Ventures Ltd for project completion. The Supreme Court further noted that allowing the CIRP could potentially result in significantly higher costs for homebuyers compared to the offer presented by the promoter.

Yet, despite its benefits, Reverse CIRP encounters legal hurdles, particularly in light of Section 29A of the IBC, which prohibits the promoter of the entity from being the resolution applicant. The scheme of Reverse CIRP deviates from the IBC's provisions, raising debates on its compatibility with Section 29A. The Supreme Court's purposive interpretation of Section 29A in cases like **Arcelor Mittal vs. Satish Kumar Gupta**^[7] presents a potential barrier to the application of Reverse CIRP. In *Supertech Ltd.*, appellants challenged NCLAT's authority to accept the promoter's resolution plan without CoC review, underscoring the clash with Section 29A.

Overview of recent developments in the field of real estate under the insolvency process

In its recent press release dated 16th February 2024, the Insolvency and Bankruptcy Board of India (IBBI) unveiled a significant development aimed at bolstering the real estate sector's resilience amidst insolvency challenges. This development comes in the form of the introduction of 'project-wise' resolutions within real estate insolvency cases.

Under this new framework, amendments to the IBBI (Corporate Insolvency Resolution Process) regulations, 2016 empower the Committee of Creditors (CoC) to direct the Resolution Professional (RP) to invite a separate resolution plan for each distinct project within a real estate development project. This move is a departure from the conventional approach where the entire company's insolvency proceedings are initiated, often leading to a blanket approach to resolution that may not be suitable for all projects within the company's portfolio. The regulation reads as follows:

36A. Invitation for expression of interest.

“ The resolution professional shall publish brief particulars of the invitation for expression of interest in Form G of the [Schedule-I] at the earliest, not later than sixtieth day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans.

[Clarification: The resolution professional after the approval of the committee may invite a resolution plan for each real estate project or group of projects of the corporate debtor.]”

Additionally, the IBBI has mandated that in cases involving corporate debtors engaged in real estate development, the Insolvency Resolution Professional (IRP)/RP must maintain distinct bank accounts for each specific real estate project. This mandate aims to enhance transparency and accountability in fund management, ensuring that the finances associated with each project are managed and utilized appropriately throughout the resolution process.

Regulation 4D. Operating separate bank account for each real estate project.

Where the corporate debtor has any real estate project, the interim resolution professional or the resolution professional, as the case may be, shall operate a separate bank account for each real estate project.]

Conclusion

The paradigm shift instigated by the IBC proves pivotal in empowering homebuyers as financial creditors, granting them a concrete voice and active participation rights within the resolution process. This newfound standing ensures homebuyers a place at the decision-making table—a privilege previously beyond their reach. As a result, they can now play a proactive role in shaping crucial resolutions that directly impact the fate of real estate companies. This progressive change not only rectifies historical imbalances in homebuyers' rights but also fosters a more equitable and inclusive resolution framework, aligning seamlessly with the broader objectives of the IBC to enhance efficiency and fairness in insolvency proceedings.

In essence, the introduction of project-specific resolutions in real estate insolvency cases reflects a pragmatic and tailored approach to navigating the complexities of the sector within the insolvency law framework. This amendment underscores the IBBI's unwavering commitment to bolstering the efficiency and effectiveness of insolvency cases, particularly in sectors like real estate, characterized by unique challenges and dynamics.

References:

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 - [7] Arcelormittal India Pvt. Ltd. Vs. Satish Kumar Gupta & Ors. dated 04.10.2018 [\(2018\) ibclaw.in 31 SC](#)

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