



**KHAITAN**  
**& CO** ADVOCATES  
SINCE 1911



5 December 2024

## **IBBI'S Proposal for a more Efficient Resolution of Real Estate Insolvencies**

## BACKGROUND

The insolvency of a real estate company is starkly different from a normal corporate insolvency resolution process (CIRP) for it involves and impacts large groups of allottees whose debts can majorly be realised only via the construction of their units, which in turn requires approval from land authorities, and other diverse stakeholders. The Insolvency and Bankruptcy Board of India (IBBI) has time and again highlighted the challenges and evolving market realities associated with such insolvencies and it has accordingly on 7 November 2024 published a 'Discussion Paper on issues related to Real Estate' (Discussion Paper) which draws significantly from the findings and recommendations of the report of the study group constituted by the Indian Institute of Insolvency Professionals of ICAI which focused on 'Improving Real Estate Resolutions Under IBC and Coordination With RERA' (Report). The Discussion Paper attempts to address the concerns and practical challenges raised during stakeholder consultations with resolution applicants, insolvency professionals, etc., with the ultimate aim of enhancing the efficiency and effectiveness of a real estate insolvency proceeding.

## ISSUES AND PROPOSAL:

**A. Inclusion of land authorities in the CoC meetings:** The Discussion Paper notes that the land authorities play a crucial role in the CIRP of a real estate company, however, since they are currently classified as operational creditors, they are excluded from representation in the committee of creditors (CoC). This absence leads to insufficient consideration of their perspectives on land related issues and regulatory requirements, thereby causing delays or complications in implementation of approved resolution plans. The Discussion Paper also notes that inputs from land authorities which could also enhance the viability and feasibility of the resolution plan is also missed, consequently reducing coordination between the insolvency proceedings and land related matters. Since the land assets are the primary assets in a real estate

insolvency, the Discussion Paper notes that there is clear need to ensure that the land authorities have a channel to provide their input in the CIRP of such corporate debtor.

In view of the above, the Discussion Paper contemplates introduction of new sub-regulation to Regulation 18 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) which would require the resolution professional to invite the 'competent authority' as defined in the Real Estate Regulation Act, 2016 to attend CoC meetings. Such invitees shall be mere observers without any voting rights. The proposed amendment is aimed at enhancing transparency and building confidence among homebuyers and other stakeholders of the resolution process.

**B. Handling of cancelled land allotments:** There have been multiple instances where allotment of land have been cancelled and possession have been taken back by the authorities before the insolvency commencement date (ICD). This in turn creates uncertainty in the CIRP as the primary asset of the corporate debtor is unavailable.

In order to address the above, the Discussion Paper proposes to amend the CIRP Regulations which would require the resolution professional to report to the CoC and adjudicating authority when land allotment has been cancelled and possession taken back by authorities before the ICD in real estate insolvency cases. This may in turn enable the CoC to explore other alternatives such as CIRP withdrawal, early liquidation / dissolution or continuance of CIRP. This is consistent with Regulation 40D of the CIRP Regulations which provides that the CoC shall be provided with all factors when contemplating viability of the real estate project and liquidation of the corporate debtor. Accordingly, the Discussion Paper proposes introduction of Regulation 30C under which resolution professional shall prepare a report detailing status of development rights and permissions required for development of the projects

and shall first submit the report to the CoC and thereafter to the adjudicating authority along with the opinion of the CoC, within 60 days of ICD.

- C. **Facilitation for participation of association of allottees:** In real estate insolvencies, allottees are the primary stakeholders and can participate as prospective resolution applicant under the aegis of an 'association' under the current regulatory framework. The Discussion Paper however notes that such associations are often prevented from participating in resolution plan process due to stringent eligibility criteria as contemplated by the CoC.

Considering that allottees have the most direct interest in project completion, the Discussion Paper proposes the introduction of an explanation to Regulation 36A(4) which shall empower the CoC to relax eligibility criteria, provisions for earnest money deposit and performance security requirements for allottees associations or groups that represent 10% of allottees or 100 allottees, whichever is higher.

- D. **Clarification regarding interest on allottee claims:** Regulation 16A(7) of the CIRP Regulations provides for calculation of voting share of the allottees based on the financial debt owed to them coupled with a minimum interest rate of 8% per annum. However, it was noted that there exist inconsistencies between insolvency professionals, while some include the 8% interest for calculation of claims, others only use it for voting share calculation. This in turn leads to homebuyers approaching forums like RERA or consumer courts for inclusion of interest amount thereby leading to multiplicity of litigation.

In order to remove such inconsistencies, the Discussion Paper aims to introduce sub-regulation (3) in Regulation 8A clarifying that the provision of interest at 8% per annum should also be construed as part of claims of the allottees.

- E. **Representation of larger number of creditors through facilitators:** The current framework under the Code and CIRP Regulation allows appointment of only one

authorised representative (AR) per class of creditor, regardless of the class size. The Discussion Paper notes that the sole AR may face challenges in communication and effective representation in cases where the class contains very large number of creditors. This may also lead to inadequate representation of the diverse interests within the class and communication bottlenecks.

To resolve the same, the Discussion Paper proposes insertion of sub-regulation 3D in the CIRP Regulations for appointment of facilitators (such facilitators is capped at 5) for large classes of creditors, so as to improve communication and representation.

- F. **Dissemination of CoC minutes to all creditors in class of real estate projects:** The Discussion Paper notes that the minutes of meetings in the CIRP of a real estate project contains discussions and decisions about project status updates, financial decisions affecting the project, timelines for project completion, challenges faced in resolution process, applications filed before the adjudicating authority, CIRP costs etc., While the CIRP Regulations provide that the AR should review and circulate the minutes to all allottees and thereafter brief the allottees on the discussion of the CoC meetings, the same is often not happening due to lack of communication between the AR and the allottees.

To bridge the data gap, the Discussion Paper proposes the introduction of proviso to Regulation 25(5), which shall empower the resolution professional in a real estate CIRP to place the CoC minutes on the website of the Corporate Debtor. These minutes shall be accessible to the allottees via a secured login system.

- G. **Handover of possession of units in real estate projects:** The Discussion Paper notes that in the cases of real estate insolvencies, it is frequently witnessed that while creditors have fulfilled their contractual obligations and the corporate debtor has completed the construction of the units, the formal handover remains pending due to queries revolving moratorium. The Discussion Paper draws

from the decision of the Hon'ble Supreme Court dated 27 September 2024 in *New Okhla Industrial Development Authority v. Lotus 300 Apartment Owners Association & Ors. (Petition(s) for Special Leave to Appeal (C) No. 17238-17239/2024)* along with the decisions of the Hon'ble NCLAT in *Alok Sharma & Ors v M/s I.P. Constructions Pvt Ltd (CA (AT) (Insolvency) No. 350 of 2020)* to note that the transfer of ownership and registration may happen during the CIRP period and the same does not amount to violation of moratorium. Further, the Discussion Paper also notes that the resolution professional should not include those units which are under technical possession of the allottees as part of the assets of the corporate debtor in a CIRP process.

Accordingly, the Discussion Paper introduces Regulation 4(E) in the CIRP Regulation which allows the resolution professional, with the consent of 66% of the CoC, to handover the ownership of the units wherein the allottee has performed his financial obligations / on payment of balance amount, if any; or provide an option to hand over the possession of the units to the allottees on an 'as is where is' basis.

## COMMENTS

Considering the peculiar challenges involved in a real estate insolvency which in essence can only be maintained as a going concern and subsequently resolved by facilitating the construction of the units and handover to the allottees, it is essential that the IBBI has recognised the real estate insolvency as a separate class of insolvency with its own set of challenges. These challenges become more complicated since most of the land over which such projects are formulated are leased from the relevant land authority for e.g., NOIDA, YEIDA etc., who in turn are owed huge debts under the lease agreements and have either cancelled such leases or refused

to execute the sale agreements before settlement of their debts. Hence, the non-settlement of debt of any land authority in turn prevents non-registration of units in favour of the homebuyers, which in turn leads to loss of revenue for the corporate debtor and the same goes on and on in an infinite loop thereby leading to insolvency.

In order to resolve such practical issues, the Discussion Paper rightly proposes the inclusion of land authorities as invitees in the CoC. This will provide both the resolution professional and the incoming resolution applicant the opportunity to discuss and resolve any disputes with such land authorities and also help in safeguarding their interests under the resolution plans. This is essential since it will help in ultimate sale of the units and realisation of profits which shall then lead to the success of any resolution plan. Additionally, the provision regarding intimation of cancelled land allotments for determination of relevant action shall further materialise in the presence of the land authorities who can discuss such actions with the CoC.

Further, the proposal for multiple facilitators for a class of creditors is much needed especially in cases wherein the relevant corporate debtor has multiple projects with allottees having diverse requirements and interests in regard to such projects. Finally, the clarification regarding possession of units during moratorium with the approval of CoC and exclusion of possessed units from the assets of the corporate debtor are laudatory steps in the interest of the allottees. It will also be interesting to see how 'technical possession' is finally defined under the CIRP Regulations.

- Dr. Siddharth Srivastava (Partner), Mohit Kishore (Counsel) and Shikha Mohini (Associate)

For any queries please contact:  
[editors@khaitanco.com](mailto:editors@khaitanco.com)

## AMBITION STATEMENT

*"Our ambition is to be a respectable law firm providing efficient and courteous service, to act with fairness, integrity and diligence, to be socially responsible and to enjoy life. We should put greater emphasis on working in consonance with our aforesaid values than on maximizing earnings. Earn we should but with dignity and pleasure."*

Khaitan & Co is a premier full-service Indian law firm with 25+ practice areas, over 1,000 lawyers, including 200+ partners. To know more about us, please visit [www.khaitanco.com](http://www.khaitanco.com)