

IBC – Fresh Hope for India's Real Estate Stakeholders





Kumar Saurabh Singh
Partner
Khaitan & Co



Sudip Mullick
Partner
Khaitan & Co



Shobhit Agarwal
MD & CEO
ANAROCK Capital

In 2016, pursuant to the recommendations of Bankruptcy Law Reforms Committee, the Parliament of India enacted the Insolvency and Bankruptcy (IBC), for tackling alarming levels of non-performing loans in the Indian banking system. The IBC was enacted in the backdrop of a myriad and inefficient regime governing insolvency resolution comprising of multiplicity of laws such as the Sick Industrial Companies Act, 1985 (now repealed), Provincial Insolvency Act, 1926, Presidency Towns Insolvency Act, 1920 etc., which failed to achieve time-bound resolution of distressed companies.

As has been elucidated in this article, since its inception in the year 2016, IBC has proven itself to be a key legislation which has helped India take strong strides in its journey towards resolution of stressed assets and improving the ease of doing business. This is reflected in the improvement in India's ranking from 132nd position to the 63rd position in the World Bank's Report on the 'Ease of Doing Business'.

It is also worthwhile to mention that IBC has also been one of the most dynamic legislations which has constantly been evolving based on the experiences of various stakeholders. Thanks to the proactive interventions from the IBBI and the Government of India, IBC has emerged not only as an efficacious economic legislation but also a social legislation which has ensured the protection of interests of various stakeholders of a distressed company, including its workmen and employees.

One such stakeholder whose interest has been specifically protected under the scheme of the IBC is a home buyer who has been allotted a unit in a real estate project.

From expressly including home buyers within the scope of 'financial creditors' to creating legislative and judicial framework for project/asset wise resolution of a real estate company, the scheme of the IBC has been consistently evolving putting in tailor-made legal framework for the insolvency resolution process of a real estate company in such a manner that the interests of home buyers are protected to the maximum extent possible.

In this report:

1. We have analysed and examined the evolution of IBC from its inception to its current iteration with a specific focus on the real estate sector.
2. We have tracked key legislative and judicial developments in the scheme of the IBC, particularly such developments which pertain to or have been introduced for the benefit of home buyers.
3. We have also examined empirical data to analyse the scope and extent of improvement that the scheme of the IBC has managed to usher in since its inception.
4. Lastly, we have shared our thoughts on what possible changes could be introduced into the scheme of the IBC to help better realise the objective of expeditious and efficacious resolution of stressed assets, in the real estate sector.

The Insolvency and Bankruptcy Code, 2016 (IBC or Code) has been a landmark legislation in India aimed at reforming its credit markets, ensuring time bound resolution of distressed companies, improving availability of credit in the market, balancing the interest of all stakeholders, ensuring value maximization, spurring entrepreneurship by improving the ease of doing business, and ensuring efficient capital allocation in the economy.

As with any new legislation, stakeholders were initially apprehensive of the potential of the IBC, due to a combination of factors such as lack of sufficient incentives, lack of clarity and disincentives for creditors to take a company into corporate insolvency resolution process (CIRP) to recover dues.

Subsequently, in 2017, amendments were made to Banking Regulations Act, 1949, which was followed by the Reserve Bank of India (RBI) notification dated 12th February 2018 on 'Resolution of Stressed Assets – Revised Framework' (12th February Circular) which led to a comprehensive revamp of stressed asset restructuring in India. However, the 12th February Circular was struck down by the Hon'ble Supreme Court (SC) and a newer framework known as 'Prudential Framework for Resolution of Stressed Assets' was notified by the RBI on 7th June 2019 (Prudential Framework).

The failure of restructuring under the Prudential Framework, required banks and financial institutions to explore initiating CIRP against the borrowing company under the IBC.

These developments enhanced the jurisprudence of the IBC as one of main framework dealing with resolution of stressed companies.

In this report, besides discussing the overall framework under IBC, we will also dwell into certain issues in respect of inter play between IBC and the real estate sector.

Some of the key aspects that we seek to address in this report are as follows:

1. Key legislative developments within IBC impacting the real estate sector
2. Landmark judgments with respect to real estate sector
3. Resolution track record in real estate v/s. overall cases resolved
4. IBC as a recourse for operational creditors
5. Time taken to resolve real estate insolvencies
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01 The Background

The Background

Insolvency resolution in India prior to IBC

Prior to introduction of IBC, multiple statutes provided the legislative framework for restructuring / enforcement / recovery of dues by financial and non-financial creditors.

These legislations primarily comprised of:

1. Companies Act, 2013
2. Sick Industrial Companies (Special Provisions) Act, 1985
3. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002
4. Recovery of Debts due to Banks and Financial Institutions (RDDBFI) Act, 1993
5. Indian Contract Act, 1872
6. Income Tax Act, 1961

As can be seen from the above, earlier, the resolution process for financial and non-financial creditors was scattered across legislations which resulted in multiplicity of litigations and consequently took several years to conclude. Through decades, many committees were constituted by the Indian government to address the issue of poor recovery and long timelines to conclude resolution of assets in distress.

The details of the various committees which were constituted to revamp the insolvency framework in India are set out as below:

24th Law Commission
Amendments to the Provincial Insolvency Act, 1920

1964
Narasimham Committee I (RBI)
RDDBFI Act

1981
Tiwari Committee (Department of Company Affairs)
Enactment of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)

1991
Narasimham Committee II (RBI)
Enactment of SARFAESI, conceptualisation of Asset Reconstruction Companies ("ARC(s)")

1999
Justice Eradi Committee (Government of India)
Companies (Amendment) Act, 2002, proposed repeal of SICA

2001
L. N. Mitra Committee (RBI)
Proposed a comprehensive bankruptcy code



Government committees on bankruptcy reforms

2008
Raghuram Rajan Committee (Planning Commission)
Proposed improvements to credit infrastructure

2013
Financial Sector Legislative Reforms Commission (Ministry of Finance)
Draft Indian Financial Code which includes a "Resolution Corporation" for resolving distressed financial firms

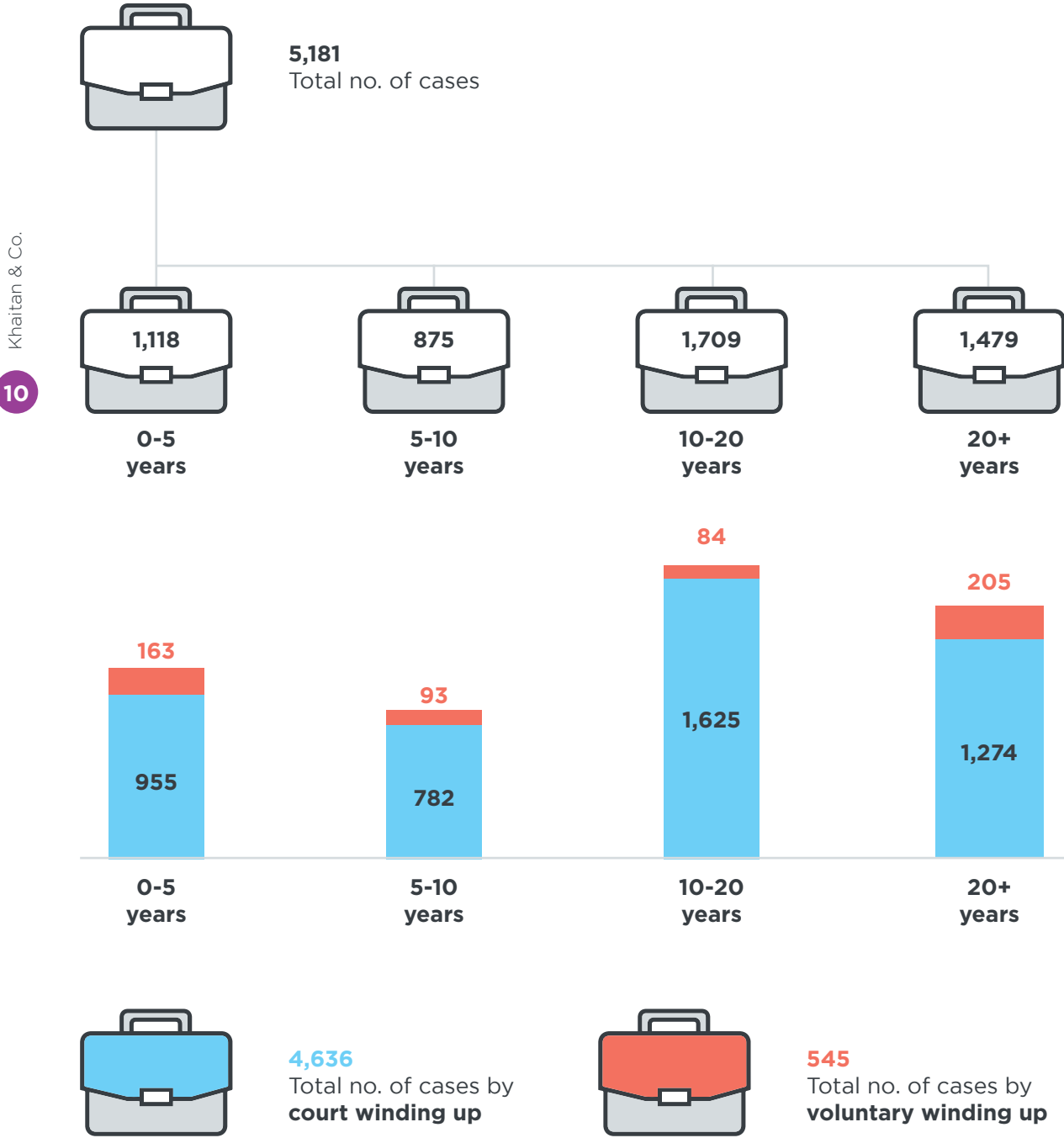
2005
Irani Committee (RBI)
Enforcement of Securities Interest and Recovery of Debts Bill, 2011 (with amendments to RDDBFI and SARFAESI)



Besides these, in 2014, RBI in its “Framework for Revitalizing Distressed Assets in the Economy – Guidelines on Joint Lenders’ Forum (JLF) and Corrective Action Plan (CAP)” had suggested banks taking over the management of the business of the defaulting company as a part of restructuring of stressed assets.

Despite all these efforts, winding up processes in India took an unacceptably long time with over 60% cases taking 10+ years and ~80% cases taking 5+ years.

Winding up process was very arduous in the pre-IBC era

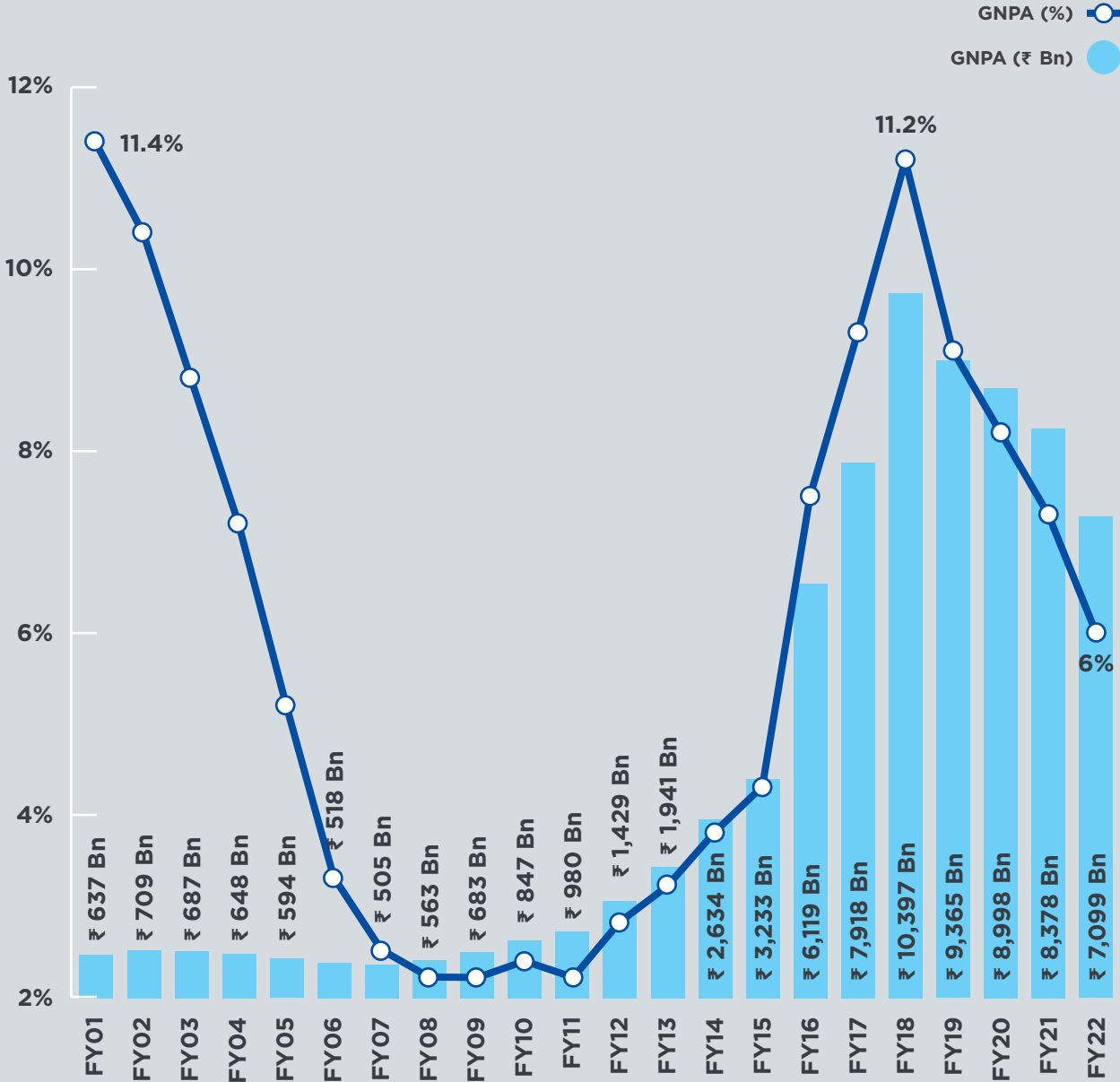


Source: Report of the Joint Committee on the IBC

Additionally, the resolution process was earlier skewed in favour of promoter / Corporate Debtor (CD), and this led to an unhealthy debtor-creditor relationship.

This was reflected in the high non-performing assets (NPAs) in the system which saw a 17-year high NPAs in the year FY18.

NPAs of scheduled commercial banks reached a 17-year high in FY18



The tremendous increase in the NPAs, led to reluctance by banks and financial institutions to lend, which was reflected in higher risk premia for even healthy borrowers. Furthermore, productive assets remained locked in dysfunctional businesses, while hampering the ease of doing business. Accordingly, concerned by the increase in NPAs impacting the overall economy of the country, the GoI initiated steps to develop a comprehensive framework for resolution of stress in distressed companies.

FY = Financial Year; starting 1st April until 31st March of the following year
Source: RBI, ANAROCK Capital Markets Research

02

The Making of the Insolvency & Bankruptcy Code 2016 (IBC)

The Making of the Insolvency and Bankruptcy Code 2016



In August 2014, the Ministry of Finance set up the Bankruptcy Law Reforms Committee (BLRC), which recommended adoption of a comprehensive law for time bound resolution of the distressed corporate entities.

The recommendation of the BLRC led to the formulation and promulgation of the IBC in 2016. However, in the starting the banks and financial institutions remained tardy in invoking the provisions of the IBC.

Subsequently, Banking Regulation (Amendment) Act, 2017 bestowed RBI the power to direct the banks to initiate CIRP against the defaulter company under IBC.

Thereafter, the RBI notified the 12th February Circular whereby, the guidelines and schemes dealing with stressed assets were completely overhauled, and a new set of rules were framed.

However, the 12th February Circular was struck down by the SC in the matter of Dharani Sugars and Chemicals Ltd. v/s. Union of India and others, in April 2019, post which RBI issued the Prudential Framework on 7th June 2019.

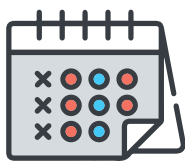
Ever since, the Prudential Framework was notified, the banks and financial institutions became more active in restructuring the debt of distressed companies under the Prudential Framework. Admittedly, unlike the 12th February Circular, the Prudential Framework did not mandate the creditors to initiate proceedings under IBC in the event of failure of restructuring attempts under the 7th June Circular.

However, the Prudential Framework recognised that instituting proceedings under IBC is one of the means for resolution of financial stress in a borrower. This gave fillip to the lenders (particularly banks) to start invoking the provisions of IBC for initiation of CIRP against the distressed companies.

In this regard, the table below describes the increase in initiation of CIRP against the distressed companies from the year 2019 onwards.



Insolvency cases filed under IBC (year wise)



CLOSURE BY



Year / Quarter	CIRPs at the beginning of the period	Admitted	Appeal / Review / Settled			Withdrawal under Section 12A	Approval of Resolution Plan	Commencement of Liquidation	CIRPs at the end of the period
FY17	0	37	1	0	0	0	0	0	36
FY18	36	706	94	0	20	0	91	537	537
FY19	537	1,157	154	97	78	306	1,059	1,059	1,059
FY20	1,059	1,986	344	217	137	542	1,805	1,805	1,805
FY21	1,805	538	86	160	120	351	1,626	1,626	1,626
FY22	1,626	834	52	112	125	319	1,852	1,852	1,852
Total		5,258	731	586	480	1,609	1,852	1,852	1,852

FY = Financial Year; starting 1st April until 31st March of the following year
Source: Insolvency and Bankruptcy Board of India

Key amendments to IBC since inception

The IBC has turned out to be a critical and landmark piece of legislation in India, which has helped India improve substantially on the 'Ease of Doing Business' ranking. Pursuant to the introduction of the IBC, several distressed companies in sectors like steel, cement, manufacturing, pharma, real estate etc. were put through resolution process and have been successfully revived which led to timely recovery for banks and at the same time saved the distressed entities from going into liquidation which would have been detrimental to the interest of all the stakeholders. However, this legislation in its short history has seen multiple amendments as the government responded to the practical difficulties faced during implementation.

The key outline of the amendments may be summarised as:



28th Dec, 2019

Introduced 2 critical provisions in section 14 of the Code, by clarifying that a license, permit, registration, quota, concession, clearance or a similar grant given by the Central Government, State Government, local authority, sectoral regulator or any other authority shall not be suspended or terminated on grounds of insolvency.

Introduced section 32A which facilitated a 'clean slate transfer' of the CD to a new resolution applicant after approval of resolution plan. Under this provision, so long as there is a change in control of the CD post the implementation of resolution plan, any stay/liability in relation to the CD/its assets shall stand extinguished by virtue of the approval of the resolution plan.

This amendment also provided for cases where the Financial Creditor (FC) applying for CIRP of a CD happened to be an allottee of a real estate project. Per this amendment, an application for initiating CIRP against the CD shall be filed jointly by not less than 100 of such home buyers, or 10% whichever is less of the total number of such allottees under the same real estate project.

5th Jun, 2020

This amendment was introduced in the wake of COVID-19 induced lockdowns. **The said amendment introduced section 10A** which suspended filing of section 7, 9 and 10 applications arising out of defaults occurring on or after 25th March 2020, until the specified period.

4th Apr, 2021

Introduced pre-packaged insolvency resolution process for corporate MSMEs.

16th Sep, 2022

Amended the IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016 which provided that if the resolution professional does not receive resolution plan in response for request under the said regulations, then she/he may issue request for resolution plan for sale of one or more of assets of the CD. This also amended the CIRP Regulations to the effect that it allowed prospective resolution applicants to include sale of one or more of the assets of the CD as part of the resolution plan. **The amendment also requires the resolution professional to prepare a strategy for marketing of the assets of the CD, where the assets of the CD exceed ₹ 1 Bn.** The decision of implementing such strategy, along with its cost will be subject to the approval of the Committee of Creditors (CoC).

11th Oct, 2022

The RBI by circular titled 'Review of Regulatory Framework for Asset Reconstruction Companies (ARCs)' allowed ARCs to submit resolution plan under the IBC.

23rd Nov, 2017

Introduced section 29(A) which excludes promoters and related parties from participating as a resolution applicant in the CIRP of the CD. The object and purpose of this amendment was to prohibit persons who contributed to the insolvency of the CD "or are otherwise undesirable" to submit a resolution plan for the CD. This provision eventually led to exclusion of promoter and its group entities from some mega corporate entities such as Essar Steel Ltd., Bhushan Steel Ltd., etc., and proved to be a real game changer, especially in setting the tone for a healthy creditor-debtor relationship and improving credit discipline.

6th Jun, 2018

Section 5(8)(f) introduced, which included recognition of home buyers as financial creditors.

Defined the term 'related party' & 'relative' in the context of provisions of the section 29A of the IBC.

Introduced section 12A of the IBC enabling withdrawal of application and paved the way for settlement between parties at any stage before approval of resolution plan.

Reduced the voting requirement for approval of resolution plan from original percentage of 75% to 66%.

6th Aug, 2019

Section 5(26) of the IBC was amended to widen the scope of resolution plan to include merger, amalgamation, and demerger.

Section 31 of the IBC was amended to clarify the legal position that on approval, a resolution plan shall be binding, inter alia, on the Central Government, any State Government, or any local authority, guarantors and other stakeholders involved in the resolution plan.

Important judgments in IBC

In addition to the amendments, the resolution process under IBC has been influenced by several important judgments. A few of these notable judgments are summarised below:

2018

CASE 1

Rajputana Properties Pvt. Ltd. v/s. UltraTech Cement Ltd. & Others, (2018) SCC OnLine NCLAT 521

The SC held that NCLT must ascertain that the resolution plan is fair and whether the resolution plan adheres to the object of the Code i.e., maximizes the value of assets and balances the interests of stakeholders.

CASE 2

Lalit Mishra & Others v/s. Sharon Biomedicine Ltd., (2018) SCC OnLine NCLAT 862

The NCLAT struck down the personal guarantor's (PG) right of subrogation arising after the acceptance of resolution plan and also observed that the PG's right to recover the guarantee from the CD ceases to exist when the guarantee is invoked by creditor.

2019

CASE 3

Bikram Chatterji & Others v/s. Union of India, (2019) 19 SCC 161

This particular case deals with the insolvency of the Amrapali group and is dealt with in greater detail in the section, "Marquee Real Estate Cases."

CASE 5

Edelweiss Asset Reconstruction Co. Ltd. v/s. Sachet Infrastructure Pvt. Ltd. & Others, (2019) SCC OnLine NCLAT 592

The NCLAT ordered for a simultaneous CIRP to be initiated against a group of five companies through a common resolution professional in order to develop a residential real estate project and complete it in one go.

CASE 4

Swiss Ribbons Pvt. Ltd. & Another v/s. Union of India & Others, (2019) 4 SCC 17

The SC upheld the constitutionality of the IBC and underscored that the object of the IBC was to revive the CD. The SC also underscored the fair and equitable treatment of OCs as a requirement for approval of resolution plans.

CASE 6

Pioneer Urban Land & Infrastructure v/s. Union of India, (2019) 8 SCC 416

The SC upheld the constitutional validity of the Insolvency Code (Second Amendment) Act of 2018, which classifies real estate allottees as financial creditors.

CASE 7

Shubha Sharma, suspended Board of Director v/s. Mansi Brar Fernandes, (2020) SCC OnLine NCLAT 1104

Only a "genuine allottee" of a real estate project can be considered a financial creditor. A speculative investor in a real estate project is not considered a financial creditor for the purposes of IBC. As such there is no judicial precedent which stipulates an indicative list of criteria required to be examined to determine if an allottee is merely an investor or is genuinely interested in purchasing the apartments. It is required to be examined by the facts and circumstances of each case.

Further, while it has not been expressly laid down in any judicial precedent, courts/tribunals appear to place emphasis on the factum of whether the allottee in question is interested in taking possession of the apartment in question. For instance, in the captioned judgment, the allottee of the concerned real estate project paid a consideration of ₹ 35 lakhs as consideration for a flat.

2020

CASE 8

Committee of Creditors of Essar Steel India Ltd. v/s. Satish Kumar Gupta & Others, (2020) 8 SCC 531

The SC in this case held that the NCLT and NCLAT must not trespass upon commercial decision of the CoC. There is a difference between equal and equitable treatment and hence the financial creditors and OCs cannot be treated equally as it would defeat the scheme of the IBC.

The SC also gave a go-ahead to the sale of Essar Steel India Ltd., thereby helping banks to recover almost 90% of their dues worth ₹ 400 Bn.

Additionally, the allottee entered into an MoU with the corporate debtor, which had a "compulsory buyback" in terms of which the corporate debtor was required to buy back the flat from the allottee after a period of 12 months by paying a consideration of ₹ 35 lakhs and an additional amount of ₹ 65 lakhs as premium (Buy Back Consideration). In other words, the arrangement between the allottee and the corporate debtor did not envisage the allottee in question taking possession of the flat. The allottee filed an application under Section 7 of the IBC against the corporate debtor when the corporate debtor failed to pay the Buy Back Consideration.

Dismissing the application, the NCLAT, placing reliance on the judgment of the SC in the matter of Pioneer Urban Land and Infrastructure Ltd v/s. Union of India and Others, observed that the object of IBC is to protect genuine home buyers who are interested in purchasing the apartment and not an allottee who is merely an investor. The execution of the MoU demonstrates that the allottee was merely an investor.

CASE 9

Axis Bank Ltd. & Others v/s. Lavasa Corp. Ltd., (2020) SCC OnLine NCLT 3484

The NCLT Mumbai consolidated the insolvencies initiated against various companies of the Lavasa group, in order to avoid potential losses likely to be caused by fractured insolvencies, while noting that the insolvency of the subsidiaries largely depended on the outcome of their parent's insolvency.

CASE 10

Ghanshyam Mishra & Sons Pvt. Ltd. v/s. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657

The SC determined 2 major issues and observed that Section 31 of the IBC unequivocally states that once a resolution plan is approved, it would be binding on all the creditors (including the Central Government, State Government, or any local authority), employees, and other stakeholders.

Furthermore, it was observed by the SC that all the claims that were not included in the resolution plan shall stand extinguished and all the creditors would be barred from recovering any of the dues from the CD accruing before the transfer of the management of the CD to the successful resolution applicant. This decision of SC will prevent multifarious litigations and provide an opportunity to the CD to start with a clean state with no burden of past liabilities.

2021

CASE 13

Ireo Grace Pvt. Ltd. v/s. Abhishek Khanna and Others, (2021) 3 SCC 241

The remedies available to allottees of flats/apartments are concurrent in nature. Accordingly, in case of default by the developer, the allottees will be able to pursue their remedies simultaneously under Real Estate (Regulation and Development) Act 2016 (RERA), Consumer Protection Act 2019 and trigger IBC.

Source: Web articles

CASE 11

Rajesh Goyal v/s. Babita Gupta & Others, (2021) SCC OnLine NCLAT 533

During the course of CIRP of a real estate company, if the promoters propose a resolution/settlement to infuse funds into the real estate project and resolve the stress, then the NCLT, by using its inherent powers, may direct the promoters to cooperate with the resolution professional and infuse funds into the real estate project without inviting prospective resolution applicants to submit their resolution plans.

CASE 12

Flat Buyers Association Winter Hills-77, Gurgaon v/s. Umang Realtech Pvt. Ltd. through IRP & Others, (2021) SCC OnLine NCLAT 2092

The NCLAT confined the insolvency resolution to only a particular real estate project of the CD and not all the projects.

CASE 14

Manish Kumar v/s. Union of India, (2021) 5 SCC 1

For the purpose of IBC, the “allottee” of a real estate project includes the following persons:

- a) allottee of a plot or apartment building
- b) persons to whom the apartment/plot is sold, either on freehold or on leasehold
- c) persons to whom the promoter has transferred the apartment/plot otherwise than by way of sale.



CASE 16

Puneet Kaur & Others v/s. K V Developers & Others, (2022) SCC OnLine NCLAT 245

This judgment held that the rights of a home buyer will not be extinguished even if such home buyer does not submit claims to the resolution professional before the designated date, and if such buyer’s details are part of CD’s record.

CASE 17

State Tax Officer v/s. Rainbow Papers Ltd., (2022) SCC OnLine SC 1162

The SC held that the security interest can be created over assets of the CD by operation of law. Accordingly, government authorities having statutory charge over assets of the CD by virtue of any statutory provisions can be considered as secured creditors under IBC and entitled to receive the payment pari passu with the secured financial creditors in terms of 53(1)(b)(ii) of the IBC.

2022

CASE 15

Mr. Rohit Tole v/s. Mantri Developers Pvt. Ltd., (2021) SCC OnLine NCLT 254


While concurrent remedies are available to home buyers, if a home buyer receives a money decree in his favour under RERA, then such decree will have to be enforced through RERA. The home buyer cannot file an application under Section 7 of the IBC to enforce money decree obtained from RERA.



Overall performance of IBC in India

The introduction of IBC led to a significant improvement in resolution of insolvency cases in India.

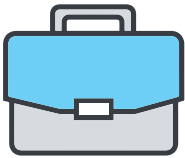
According to data from IBBI website, a total of 25,225 cases (under Sections 7, 9 and 10 of IBC) involving a total amount of ₹ 10.5 Tn have been disposed of. An additional 23,608 cases involving an amount of ₹ 7.2 Tn have been settled before admission. Resolution plans have been approved in 565 cases, involving an amount of ₹ 3 Tn.



The IBC has by far been the most significant reform concerning NPA resolution. In 2019-20, the amount recovered as per cent of the amount involved under IBC was 45.5 per cent, followed by 26.7 per cent for ARCs.

While the amount recovered through ARCs as per cent of amount involved was significantly higher in the initial years of their inception, in the recent years, it has dipped below 30 per cent except for a spurt in 2017-18.”

- RBI Bulletin April, 2021



93.6%
No. of cases settled before admission



68.7%
Value of cases settled before admission

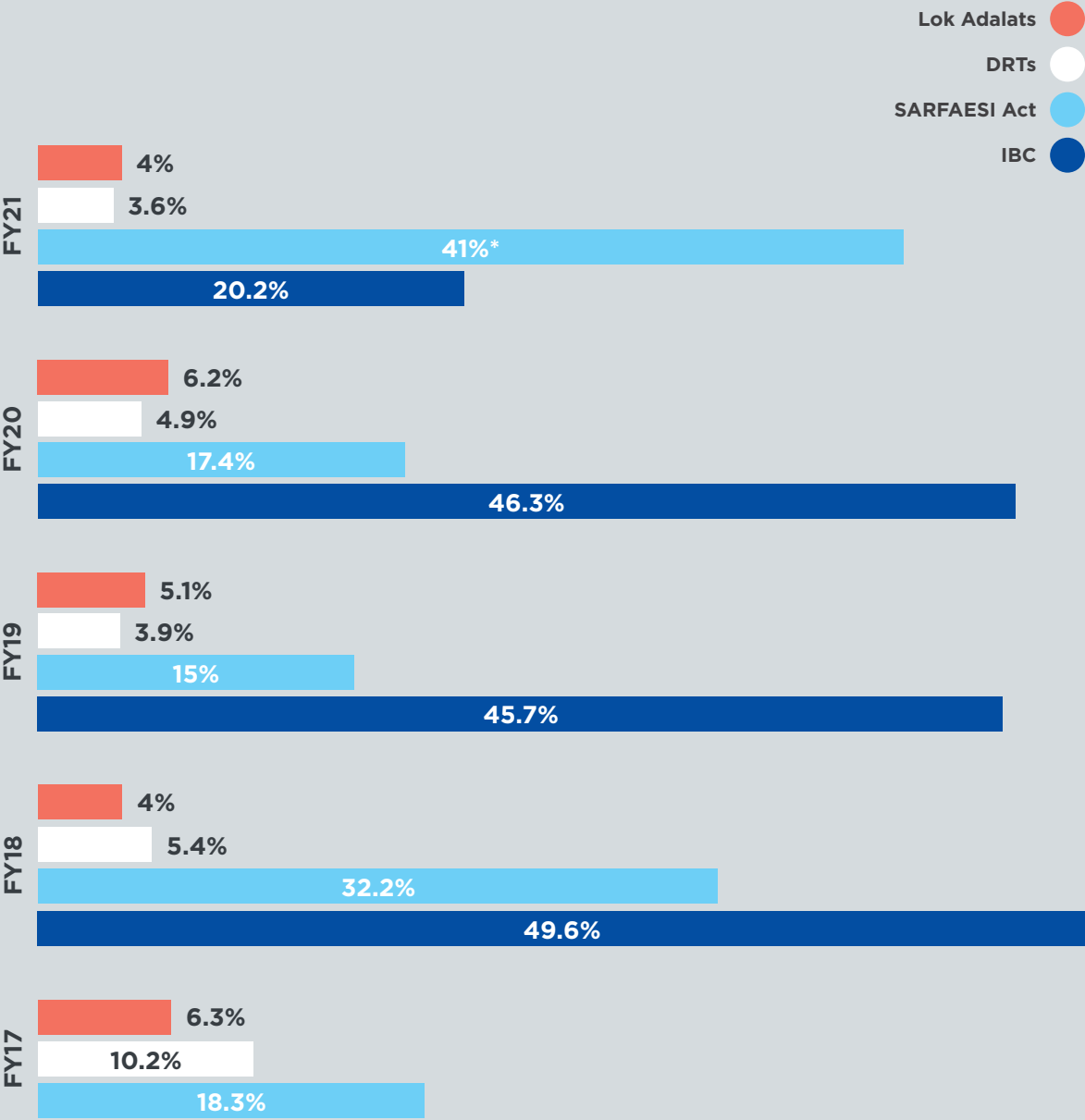


~1.8 years
Average time taken to resolve the cases under IBC (as evidenced) has also come off dramatically

This compares significantly better to the appalling ~78% cases taking over 5 years to wind up

In terms of recoveries as percent of amount involved, IBC scores better than recoveries through SARFAESI and ARCs. One of the key constraints of the ARC mode of recovery was the capital-intensive nature of the business, which worsened post RBI directive of higher down payment (from 5% to 15%) in August 2014.

Recoveries under IBC has yielded superior outcomes compared to other modes



*Refers to the amount recovered during the given year, which could be with reference to the cases referred during the given year as well as during the earlier years. FY21 saw a sharp dip in cases referred to SARFAESI from ₹1.96 Tn in FY20 to ₹ 675 Bn in FY21 (thereby causing recoveries relative to admissions in SARFAESI to look inflated)

FY = Financial Year; starting 1st April until 31st March of the following year

Source: Insolvency and Bankruptcy Board of India, Reserve Bank of India, ANAROCK Capital Markets Research

03

IBC: Resolving Insolvencies in Indian Real Estate

IBC: Resolving Insolvencies in Indian Real Estate

Key legislative developments within IBC impacting RE sector

In the initial days of implementation of the IBC, home buyers were classified as “other creditors” of the CD which led to the prospect of them receiving nominal liquidation value even in the event of a successful resolution of the CD. This entailed significant hardship for the hapless homebuyers as the Indian real estate sector was littered with real estate projects stuck at various stages of construction with thousands of home buyers getting stuck in each of the larger projects.



Taking cognizance of the plight of home buyers, the Parliament passed amendments to the IBC on 6th June 2018, wherein allottees to real estate projects i.e., home buyers were classified as FCs. However, apprehensions were placed that individual disgruntled buyers can jeopardise an entire project, placing at stake the entire project along with its many stakeholders.

Hence, another amendment was made to IBC on 28th December 2019 whereby consent of lesser of 10% or 100 home buyers would be required for a real estate company to be admitted into CIRP. To enable operationalisation of this amendment, additional provisions were made to provide data of other home buyers to the litigant initiating insolvency proceedings.

It is relevant to note that the powers of an allottee to initiate CIRP against a real estate developer was further diluted by virtue of the judgment of the NCLAT in the matter of Parvesh Magoo v/s. Ireo Grace Realtech Pvt. Ltd. wherein the NCLAT held that if there has been any delay/failure on the part of the real estate developer to deliver the flat on account of force majeure events, then such a real estate developer cannot be subjected to CIRP.

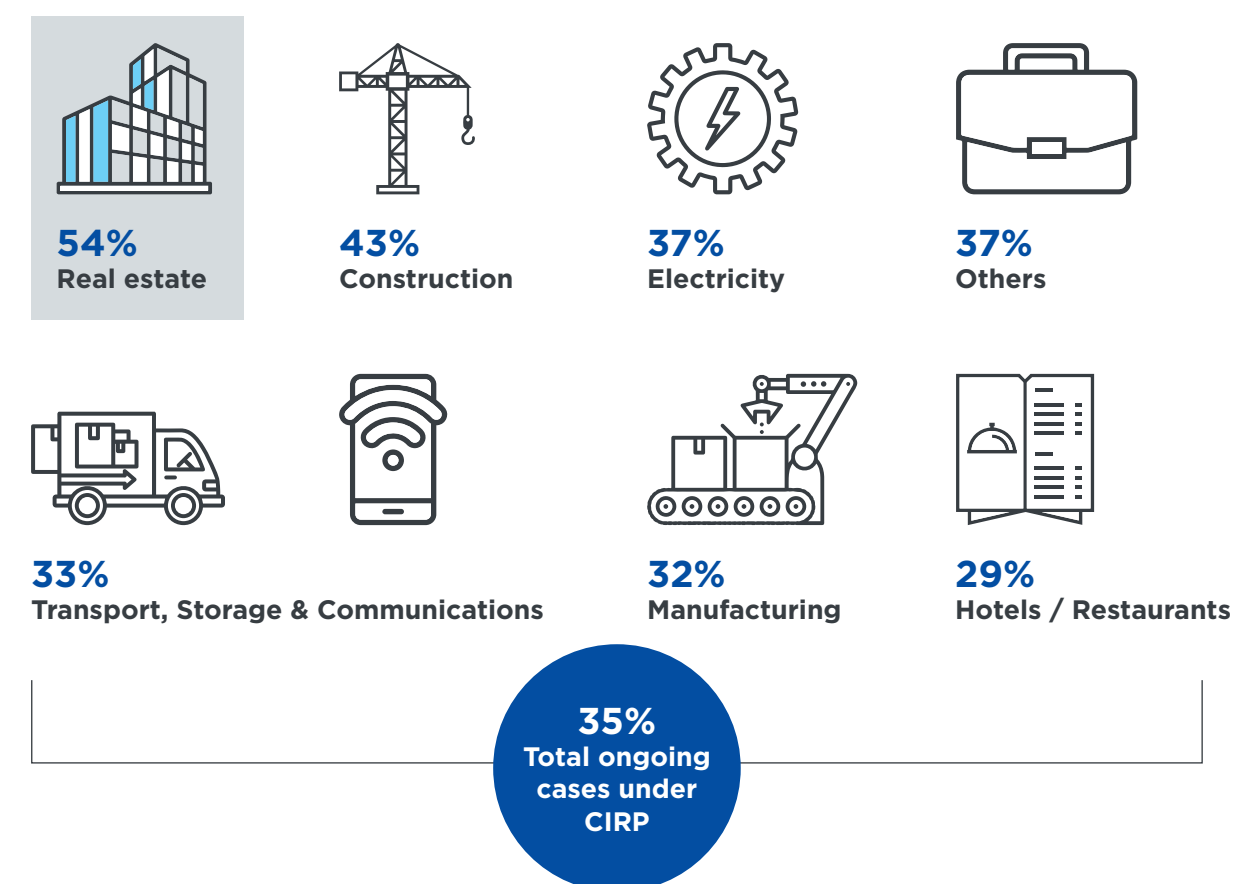
A further amendment came in recently, on 16th September 2022, which, with a view to maximise valuation, allowed the resolution professional to sell assets on a piecemeal basis. This allowed for project specific resolutions as different projects would have differing economics and different classes of resolution applicants, depending on project size, development type, stage of completion and location of project.

More importantly, this round of amendment also contains provisions for the resolution professional to outline a marketing strategy with allocation of marketing costs towards maximising the valuation of the asset where value exceeds ₹ 1 Bn.

Resolution track record in RE v/s. overall cases resolved

In terms of volume, real estate comprises of 5% of all cases. However, resolution rates are amongst the lowest in real estate – be it through liquidation or through insolvency resolution process.

Real estate has the highest proportion of ongoing cases under CIRP



While part of the high share of ongoing cases can be attributed to a recent surge in real estate cases, we believe a high proportion of ongoing estate cases is also attributable to the greater time taken to resolve real estate insolvencies amidst the various challenges faced in resolution of real estate developers.

This is also evidenced by the fact that among the prominent industries, real estate at 54%, has the highest percentage of cases are still ongoing.

As is evident from the above chart, insolvency resolution in real estate is relatively more challenging. However, in terms of value maximisation, real estate fares well with superior realisation relative to the admitted claims. Further, in our experience, many prospective bidders prefer acquiring stressed real estate through the IBC process as it helps fixing liabilities, especially those of real estate allottees.

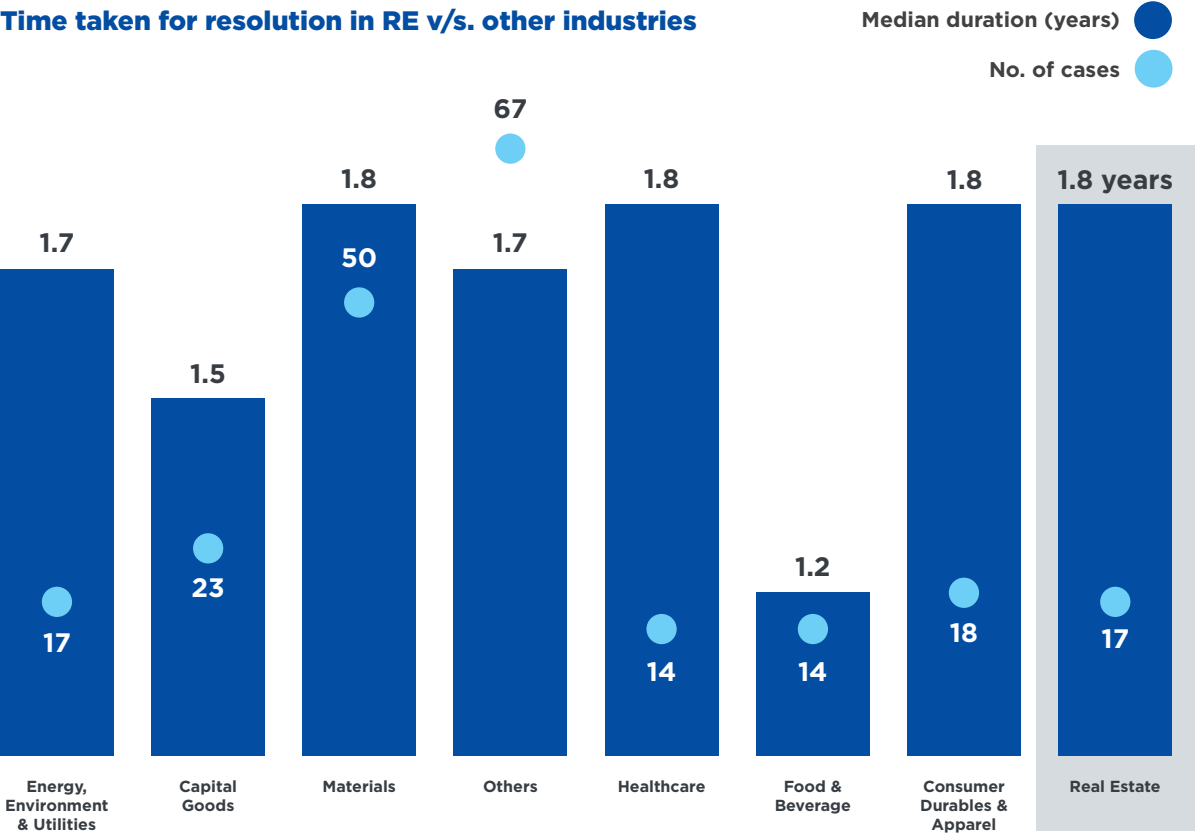
IBC delivers strong recoveries for RE in resolved cases

Sector	TAC of FCs*	LV*	Realisable by FCs*	LV /TAC	Realisable /TAC	Realisable /LV
Real Estate	45.28	18.91	29.86	42%	66%	158%
Others	7,860.98	1,352.28	2,404.66	17%	31%	178%
Total	7,906.26	1,371.19	2,434.52	17%	31%	178%

TAC = Total Admitted Claims; LV = Liquidation Value
* Values in ₹ Bn

Time taken to resolve RE insolvencies

Time taken for resolution in RE v/s. other industries



The overall framework for IBC is designed keeping in mind a resolution within the timeline of 330 days. However, it has been seen that median duration for acceptance of a resolution plan takes substantially longer than the envisaged time limit (while still being vastly superior to insolvency resolutions prior to IBC). Furthermore, our current assessment indicates high levels of vacancies in the NCLT benches and higher applications by creditors leading to their increased workload. This is likely to lead to increase in the timelines for completion of the overall resolutions.

Source: Insolvency and Bankruptcy Board of India, ANAROCK Capital Markets Research

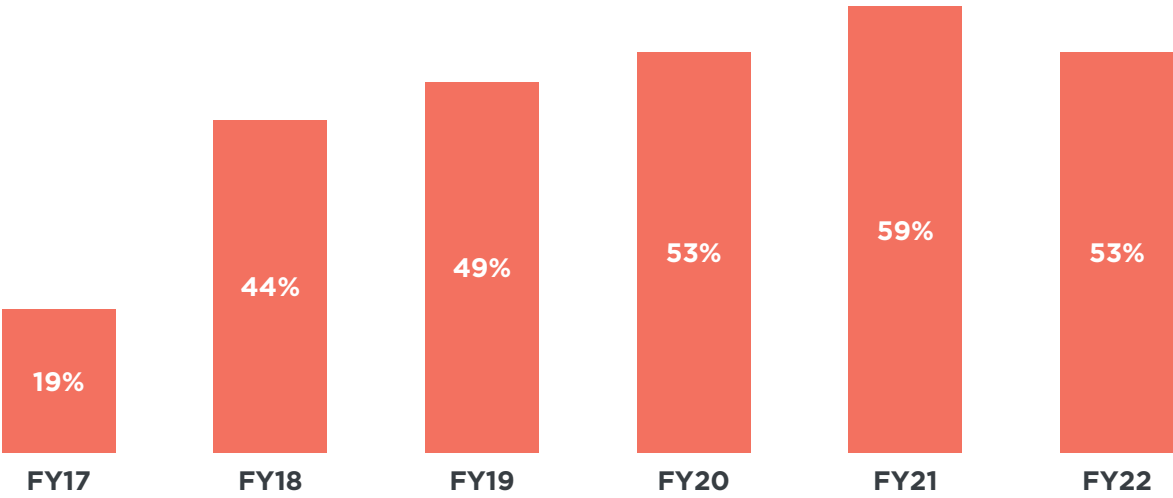
IBC as a recourse for Operational Creditors (OCs)

NCLT has also been successful to bring developers to table to settle, as witnessed in high rate of cases withdrawn due to ‘appeal/review/settlement.’

The success witnessed by OCs in recovering their dues through IBC has led to a sharp increase in share of applications filed by OCs for initiating CIRPs against corporates.



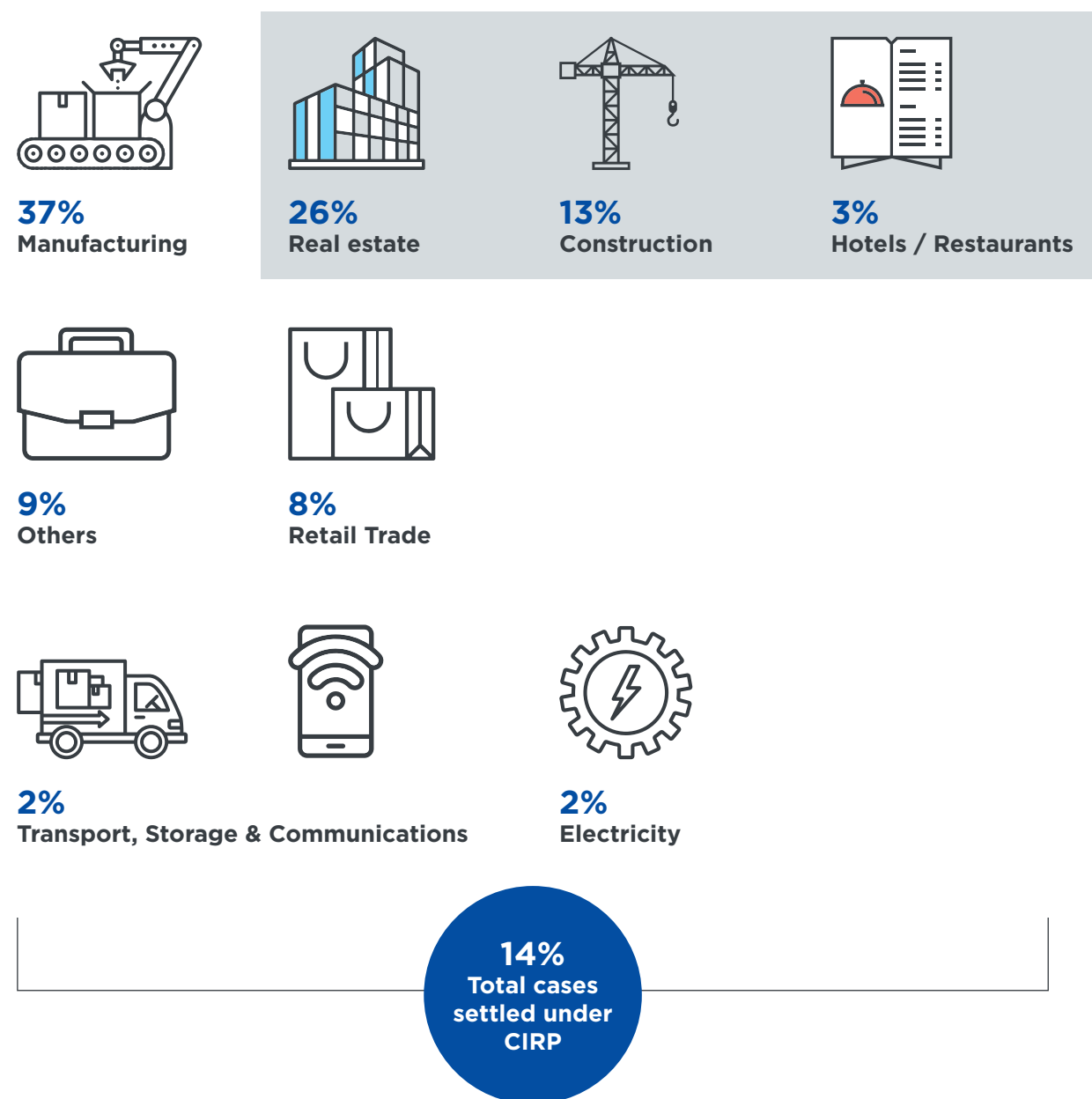
OCs are increasingly leveraging the IBC to secure their receivables



Operational Creditors (OCs) comprise 53% of those who initiated CIRP to recover their dues in FY22.

FY = Financial Year; starting 1st April until 31st March of the following year

RE / Construction / Hotels have highest share of cases resolved through settlement / appeal / review / withdrawn

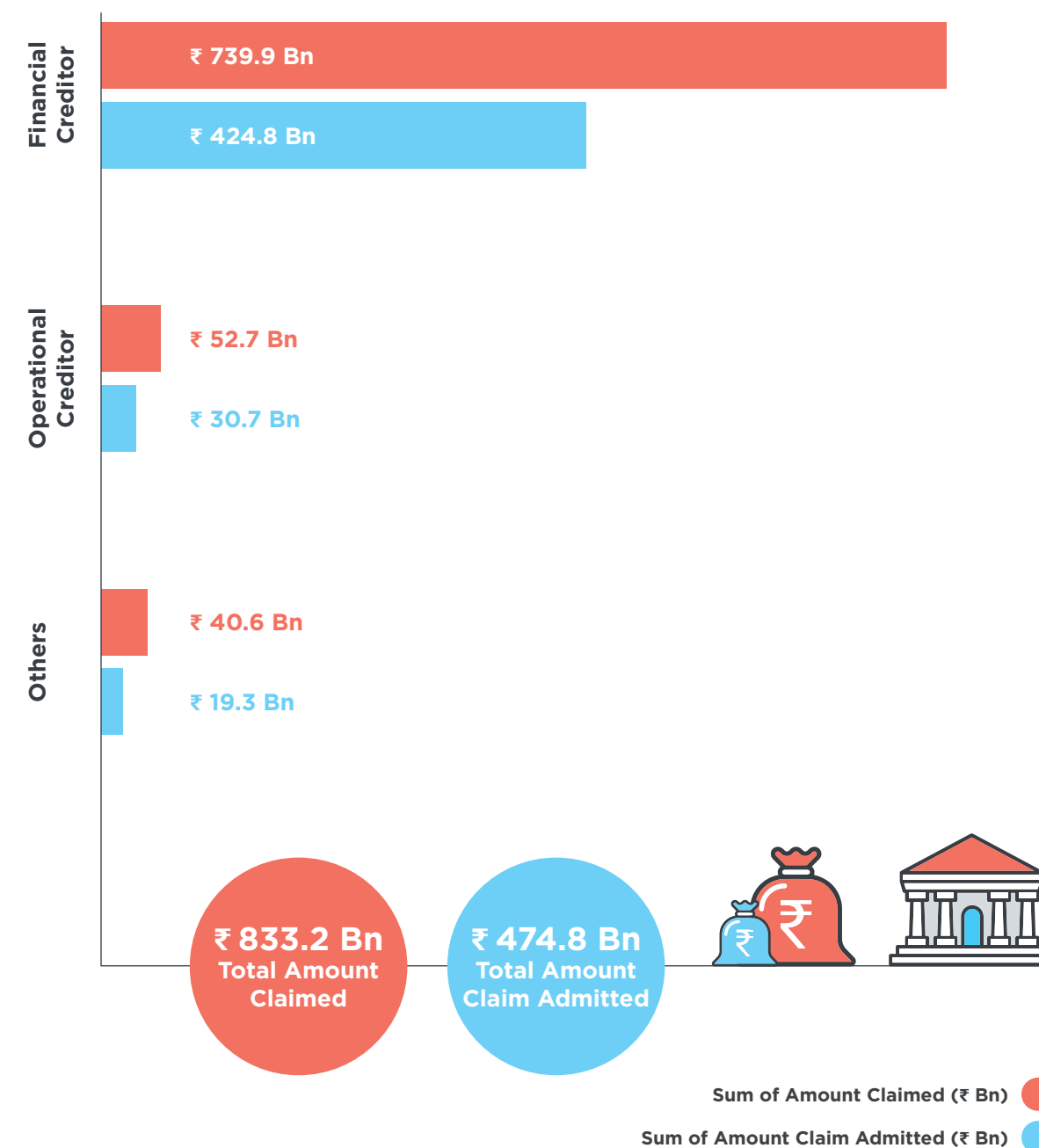


Of the total CIRP cases as on 31st December 2021, 51% of the cases had been filed by OCs. However, these cases also witnessed a substantially higher proportion of withdrawals, constituting 71% of the total withdrawn cases. This indicates that insolvency proceedings are being increasingly used as a negotiating tactic by OCs.

As on 30th September 2022, real estate had the 2nd highest share (26%) of cases under CIRP, which had been resolved through settlement / appeal / review / withdrawn.

Source: Insolvency and Bankruptcy Board of India, ANAROCK Capital Markets Research

Operational Creditors (OCs) are a fraction of admitted claims in RE insolvencies



In terms of the current mix, 46% of all ongoing cases have been filed by OCs, while 29% of all ongoing cases in real estate have been filed by OCs.

However, if one peruses the amounts involved, OCs are a minor <7% fraction of total claims admitted.

04

Marquee Real Estate Case Studies

Marquee RE Case Studies

As part of our research on the subject in consideration, we have also gone through developments in some of the well-known cases in resolution of real estate insolvencies. These case studies represent stressed assets across various geographies, project types and varying project stages.

The cases we examined are:

CASE 1

Ariisto Developers Pvt. Ltd.

Ariisto Developers was a Mumbai based developer with 17 projects at 11 locations. Founded in April 2005, it was referred to NCLT by Vistra ITCL India Ltd. over failure to dues of ₹ 16.5 Bn. As part of resolution process, a total of ₹ 24.6 Bn claims were admitted against the Company. The average liquidation of the assets were estimated at ₹ 7.5 Bn and fair value at ₹ 10.9 Bn.

Several leading developers expressed interest and were approved as prospective resolution applicants by the CoC. However, only one leading Mumbai based developer placed a resolution plan, which was however rejected by the CoC, and Form G was republished for inviting fresh Expressions of Interest (EoI).

In the second round, resolution plans were received from 3 prospective resolution applicants and opportunity was given to the prospective resolution applicants to submit revised bids. Finally, Prestige Estates Projects Limited (Prestige Estates) won the bid securing 85.48% of the votes of the CoC.

According to the resolution plan, Prestige Estates would be required to pay an upfront amount of ₹ 3.7 Bn to the creditors and allot around 0.8 Mn sf of commercial area to be developed as part of the project at Mulund.

CASE 2

Unitech Ltd.

One of the largest real estate developers in its prime, Unitech ended up in the bankruptcy courts, leaving in lurch 49 projects spread across cities though the length and breadth of India. Its incomplete inventory was estimated at over 14,000, of which 10,000 had been sold to home buyers. It was estimated that ₹ 45 Bn would be required to complete these projects, with ₹ 30 Bn recoverable from home buyers and ₹ 28 Bn from monetisation of unsold inventory.

Following the model of IL&FS / Satyam, a hand-picked board was constituted in January 2020 to navigate the company out of insolvency. However, 2 years into the process, over half the board had resigned due to varied reasons. Certain press articles indicate poor progress on the resolution emerging as a key concern.

The SC has asked the current board to draw up a payment plan for home buyers, and along with the completion timelines, place the same on the website on which suggestions have been sought from home buyers. Further, vide its order dated 20th January 2020, the SC prohibited taking any coercive actions against Unitech / its assets until the resolution of its stress by the Union Government and the SC.

It is relevant to note that this is not a resolution under IBC. The Central Government, exercising its powers under Sections 241 and 242 of the Companies Act, 2013 has replaced the board of directors of Unitech and has appointed its nominees who are working towards the insolvency resolution of Unitech. On 7th July 2020, the Union of India and the new board of Unitech submitted the resolution framework for Unitech Group.

It is interesting to note that the resolution framework expressly submits that the likelihood of receiving resolution plans under IBC for a real estate company

is relatively lower and accordingly the process under IBC shall be prejudicial for the successful insolvency resolution of Unitech.

Recently, the SC allowed the refund of monies to certain home buyers who are senior citizens and are in urgent need of funds for medical purposes. This report is expected to be submitted to the courts on the first week of October, post which the funds would be released to such home buyers.

CASE 3

Radius Estates & Developers Pvt. Ltd.

Radius Estates, part of Radius Group was the developer of the residential project, Ten BKC on a MHADA leasehold land admeasuring 20,149.40m². Radius Estates had issued non-convertible debentures (NCDs) and the debenture trustee referred the company to NCLT due to default in honouring debt service obligations. Radius Estates owed financial creditors comprising banks, financial institutions, and home buyers ₹ 30 Bn. Adani Group, though Adani Good Homes, emerged as the sole resolution applicant and their bid was approved by 80% of the creditors. However, certain creditors opposed the plan citing a 96% haircut on their dues, while favouring the home buyers.

Another contention has been with respect to the final proposal which mentioned that certain recoveries of bad debts which were supposed to be distributed to the lenders, would be retained by the resolution applicant. Subsequently, the Resolution Applicant submitted to the court that they are willing to modify this clause and distribute such recoveries to the lenders.

The matter is pending before NCLT Mumbai.

CASE 4

Jaypee Infratech

NCLT initiated insolvency proceedings against Jaypee Infratech Ltd. in August 2017, which was held in abeyance following a stay order by the SC. Subsequently, in 2018, SC ordered commencement of the CIRP.

Post 3 rounds of bidding, Suraksha Asset Reconstruction Ltd.'s offer (₹ 12.8 Bn in 10 installments, 2,552 acres of land valued at ₹ 64.50 Bn and ₹290 Mn for fixed deposit holders) was voted by the CoC, beating National Buildings Construction Corporation Limited by 0.12%. However, the case is yet to be resolved as NCLT is yet to decide on the matter. Considering that an order by NCLT can be contested in NCLAT and SC, a resolution looks some time away.

In this backdrop, National Asset Reconstruction Company Ltd. (NARCL) has offered ₹ 35.7 Bn (against ₹ 92.3 Bn; implying a 39% recovery) for the PSU Banks' share in the stressed asset. Given there was no counterbid to NARCL's offer under the Swiss challenge, the decks are cleared for transfer of PSU Banks' share of loans in Jaypee Infratech to NARCL.

At present, as per the information made available in the public, NARCL has emerged as the successful bidder for acquiring the debt from lenders of Jaypee Infratech under the Swiss challenge method. This development results in the stress of PSU Banks in Jaypee Infratech shifting to the former to NARCL.

CASE 5

Amrapali Group

A real estate developer has to work with multiple government agencies and financial institutions. When a project is stuck, various irregularities / deficiencies might come to the fore, which can make it challenging for a prospective resolution applicant to firstly assess the issues, and then resolve them within stipulated time/cost.

The Amrapali case is a landmark one, which could be a case study on how the ecosystem needs to come together to resolve corporate insolvency in real estate sector.

Amrapali Silicon City Pvt. Ltd. (ASC) was executing a ~43 acre project at sector 76, Noida. In September 2017, Bank of Baroda took ASC to NCLT over dues of ₹ 712 Mn, which was contested by a group of home buyers in September 2017, who among other matters, highlighted that the admission of ASC would trigger the liquidation of Amrapali Centurian Park. Eventually, all the projects of Amrapali Group were clubbed and NBCC formed 'ASPIRE' – (Amrapali Stalled Projects and Investments Reconstruction Establishment) under the supervision of SC with the motive to bail out over 40,000 stalled homes of stuck customers in multiple projects. In July 2019, the SC gave a historic judgment.

The judgment was significant in 2 key respects:

1. SC ruled in favour of home buyers saying that this category of stakeholders cannot be defrauded, setting aside claims of the state land authority and the banks, pointing out the gross irregularities of both the authorities and the banks in sanctioning the loans and monitoring the end proceeds.
2. The more relevant portion, in our opinion and for the purpose of this report, was that the SC handed over the control of the project to the court receiver and actively monitored the progress of the project. Where the court could use its discretionary powers, it did so. At other instances, it used moral persuasion to help the project towards completion.



Some of the instances that highlight the Hon'ble Court's involvement are:

- a. Court ordered that the project be handed over to a PSU specialised in construction activity
- b. The SC directed the authorities to grant the Occupancy Certificates (OCt) to the buildings, where flat buyers had already been staying and that the authorities could not refuse such certificate, on the pretext that their outstanding had not been paid
- c. It further directed the authorities to issue the OCts to the other buildings, as and when they were completed. The SC also directed the utility providers in the area, to provide the water and electricity connection and other utilities to the residents of the buildings that were already occupied
- d. Further, para 141 of the July 2019 order read as: "We direct the central government and the state government to take appropriate steps, on the time-bound basis to do the needful, all other such cases where the projects have remained incomplete and home buyers have been cheated in an aforesaid manner, it should be ensured that they are provided houses"
- e. Said that registration under RERA for the project would not be required for sale and marketing of the project
- f. The SC appealed to the RBI to consider issuing clearances / relaxations if required by banks to expeditiously act on the required projects after it was brought to the notice of the court that banks, were shying away from releasing the credit, citing regulatory limitations
- g. After being told by the counsel appearing on behalf of the central bank that it may not be fair on the part of the banking regulator to interfere in the commercial matters of lenders, the SC said that an 'active participation' by the RBI would expedite the exercise, without leading to any meddling in the affairs of the banks. The SC asked the RBI to appoint an officer that should assist the SC receiver, to meet members of the Indian Banks Association and seek financial support for the stuck projects
- h. ASPIRE, the project SPV for which the Court Receiver was holding 99.99% equity shares, would continue to operate under supervision of the SC till the redemption of NCDs (monies to be raised for execution of the project)
- i. The SC provided comfort to prospective lenders for enforcement of security for NCDs. Excerpt: "Given that the Proposed Transaction is entered into under the directions of the Hon'ble Supreme Court, Parties shall approach the Hon'ble Supreme Court for seeking appropriate directions in the event of any dispute in relation to the Transaction Documents or if required, for the enforcement of the Security"

According to latest available information, Amrapali is expected to give possession of over 11,000 flats by December 2022.

CASE 6

Lavasa Corporation Ltd.

Lavasa was conceptualised as India's first privately developed city, on the lines of cotton-candy harbour of Italy's Portofino in Mulshi and Velhe areas in Maharashtra's Pune district, about 180 km from Mumbai. The project was housed in Lavasa Corporation Ltd. (LCL), jointly promoted by a clutch of investors led by Hindustan Construction Company.

Lavasa was spread over ~20,000 acres and designed for 300,000 residents in villas, apartments and hotels. However, in 2010, work on the site was stopped citing irregularities in environmental approvals. Obtaining the requisite clearances set the project back by 1.5 years and impaired the brand as operations came to a standstill due to paucity of working capital, which also led to the investors and partners of the project to hold back or defer their investment plans.

Subsequently, the joint lenders' forum had approved a restructuring scheme, the implementation of which was delayed, post which the lenders decided to invoke the Strategic Debt Restructuring on 20th September 2017. However, post the RBI's revised guidelines on Stressed Assets dated 12th February 2018, all restructuring schemes were disbanded.

Finally, the company was admitted into CIRP in August 2018 with an estimated liquidation value of ₹ 40 Bn following a plea by an OC. EoIs were invited for resolution plans, and the last date was revised several times.

On the other hand, in February 2020, the Mumbai bench of NCLT had approved the request of LCL's lenders to consolidate the township developer and its 4 wholly owned subsidiaries, in a bid to drive up the realisable value. However, this process continued well beyond the last date of submission of Resolution Plans in 20 November 2020.

The insolvency process for LCL was materially different from the one witnessed in Jaypee as the latter had over 20,000 homebuyers and they constituted 66% of the CoC, whereas home buyers in LCL constituted a mere 7% vote share.

Three resolution plans were received for LCL. However in May 2021, the lenders decided to terminate the ongoing process and invite fresh bids as the then current round did not yield any satisfactory bids.

In the new round of bids concluded on 31st July 2021, two new bids were received but with substantial haircuts, while certain Prospective Resolution Agents had dropped out citing slump in realty prices and the impact of COVID-19. A group of home buyers had asked for a forensic audit – a demand which went unheeded.

While the liquidation value was initially set at ₹ 40 Bn, the same was revised to ₹ 10 Bn after the CoC had directed the RP to reassess the value.

Finally, Darwin Platform Infrastructure's ₹ 15 Bn bid was approved by the CoC post receiving 97% of the votes.

However, around 368 home buyers filed a petition in NCLT requesting that the latter reject the resolution plan citing misconduct in the CIRP and mistreatment of home buyers as a class of creditors. This petition was dismissed by NCLT in September 2022.

As part of the resolution plan, the Resolution Applicant has proposed to deliver fully constructed properties to home buyers over a period of 5 years from the receipt of EC.

However, timelines of the receipt of the same are not clear even though the RP has approached State Environment Impact Assessment Authority (SEIAA), State Level Expert Appraisal Committee (SEAC), Principal Secretary of the Environment Department (Government of Maharashtra) and has also filed appropriate applications before authorities such as the National Green Tribunal for environment clearance.

Further, according to a dismissed petition of home buyers against the resolution plan, the home buyers were offered liquidation value if they voted against the plan. However, the liquidation value was not calculated and shared with the home buyers.



Lavasa Township
MULSHI, PUNE

CASE 7

DS Kulkarni Developers Ltd.

DS Kulkarni, a leading developer from Pune was admitted into CIRP in September 2019 on an application filed by the Bank of Maharashtra. A total claim of around ₹ 17.50 Bn had been made, of which nearly ₹ 1.05 Bn was from 12 banks and other financial institutions. Three bidders placed bids for the company, of which one bid was only for a specific project.

Subsequently, the CoC approved a resolution plan valued at ₹ 8.27 Bn, which was contested by the erstwhile promoter citing misstatements and incorrect understanding of the company by the resolution professional, among other issues like procedural lapses and long and uncertain realisation for the creditors and depositors.

Currently, as per stock exchange disclosure dated 21st November 2022 made by the company, the application filed before the NCLT, Mumbai for approval of the resolution plan under Section 31 of the IBC, is scheduled to be heard on 2nd January 2023.

CASE 8

Spaze Tower Pvt. Ltd.

In November 2021, the NCLT admitted Spaze Towers into CIRP in a case involving 40 buyers of commercial space in Gurugram in which the builder had promised to repay the investment at either ₹ 55/sf/month or ₹ 65/sf/month till the office units were leased out. This was later settled and the company came out of insolvency.



CASE 9

Supertech Ltd.

In March 2022, NCLT admitted NCR based developer, Supertech into CIRP over non-payment of dues of ₹ 4.3 Bn to its lender, Union Bank of India. The latter had extended credit facilities to Supertech for selected projects (Eco Village II Phase I & Phase II, Eco Village III and Romano).

The ‘suspended director’ of Supertech pleaded before the court saying that a substantial sum has been repaid to the lender, projects have positive net worth, are viable, and that they are willing to complete the project in a time bound manner and discharge liabilities of all creditors and that only last mile funding is required, for which they are in advanced discussions with strategic partners and PE funds.

The said appellant further pleaded saying that they have 30 projects, of which 12 are complete/delivered and 18 under construction, which are mostly complete.

Various home buyers also filed interlocutory applications, some of whom praying that CIRP should not continue, and the developer be allowed to complete the project.

Some home buyers filed these applications pleading that CIRP be restricted only to the specific project, ‘Eco Village II.’

After reviewing the facts of the case, and the arguments therein, the Hon’ble Court passed directions, inter alia, that the CIRP be limited to Eco Village II.



A study of the above cases lead us to a conclusion that resolving insolvencies in real estate can be a particularly challenging task given the potentially large number of claimants, multiple and potentially opaque and uncertain regulatory processes, prospect of cost escalations and inadequate information.

Moreover, for a resolution agent to make a commercial case of a stressed asset acquisition, such commercial entity will need to drive co-operation and participation from various stakeholders with varying capabilities and interest in the project.

05

Challenges Unique to Resolving Insolvencies in Real Estate Sector

The Challenges

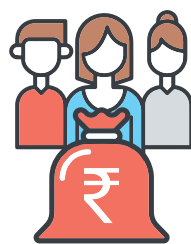


Gathering data for the information memorandum (IM)

A real estate project requires approvals from multiple authorities, most of whom are local governing bodies. A successful resolution requires the incoming developer to have specific and currently valid information with respect to the project.

This is also enshrined in Section 29 (Chapter II) of the IBC which requires the resolution professional to provide to the resolution applicant all relevant information required for the preparation and submission of a resolution plan. This necessitates the resolution professional to source information from multiple authorities, which can be cumbersome and prone to delays. The erstwhile consultants to the project may also not be co-operative.

While Section 19(2) of the IBC allows the resolution professional to approach NCLT and seek remedies against the erstwhile board of directors if they are uncooperative, we have seen that the process of approaching NCLT, obtaining orders against erstwhile management and enforcing such orders can be a cumbersome, time-consuming and often ineffective process. Further, for a project which is stalled mid-way, the structure may be exposed to elements, posing questions on the integrity of the standing structures, necessitating a structural audit. This along with the local (and, often changing) nature of building laws poses challenges for resolution, especially within the time limits as envisaged by IBC. Given the above, it is important to develop a strong information ecosystem for real estate projects to strengthen the IBC in this sector.



Retail nature of a class of financial creditors

Prior to commencing research on this subject, the author of this paper held a belief that the retail nature of financial creditors could be an area of unique concern to real estate due to the challenge of managing a large number of such creditors. However, we learnt that the number of creditors is not a direct area of concern, as the same is witnessed even in non-real estate cases where the corporate may have accepted fixed deposits from public or may have issued debentures.

The challenges with the retail nature of financial creditors, however, crops up due to the fact that often a large proportion of a family's net worth is often stuck in stuck projects and they may also face cost escalations. The other large area of concern for a successful and sustainable implementation of a resolution plan is the co-operation of co-buyers, and that appears to be a significant cause of concern. It is of paramount importance that a flat buyer has confidence that all his co-buyers will co-operate, as without such co-operation, it increases the odds of a stuck project to see the light of the day. Our conversations with industry denotes regional variances with respect to this behaviour of home buyers.



Home loans for existing flat buyers

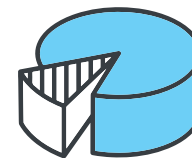
An important aspect for co-operation of co-buyers is financial closure for the existing home buyers. Our interviews with resolution professionals have thrown light on resistance by housing finance companies wherein often with an inordinate delay, of say 10 years, the borrower profile undergoes a vast change with some of them at retirement or verge of retiring. In such cases, the lender is not sure about capability of such buyers having the wherewithal to service the loans.



Insolvency professional managing the affairs of a RE company

Section 17 (Chapter II) read with Section 23(2) of the IBC provides for the resolution professional to manage the affairs of a CD from the date of such appointment of the insolvency professional. However, it may be noted that resolution professional may not be well equipped to manage the affairs of a real estate company unlike other operating businesses. While this issue is not unique to CDs in the real estate sector, it becomes more pronounced in the real estate sector on account of certain unique characteristics of a real estate project such as: (a) involvement of innumerable retail financial creditors (i.e. home buyers) who require special protection; (b) vulnerability of real estate projects to natural/environmental elements; (c) the amount of investment required to resolve the stress in a real estate company.

However, the judicial pronouncements mentioned herein above such as *Rajesh Goyal v. Babita Gupta and Others*, in terms of which courts / tribunals have allowed the promoters to work with the resolution professionals towards maximisation of interests of the home buyers is a welcome move which can be step in the right direction for resolution of distressed real estate projects.



Importance of one lender to have a clear majority

Resolution plan under IBC requires approval of 66% by majority of the CoC. However, it is important for one lender to have clear majority so that resolution plan goes through. Else, conflicting interests do not allow the resolution plan to be easily accepted. This situation gets potentially worse when the homebuyers as a class form a substantial, but non-controlling interest in the CoC. Coupled with challenges in financial closures of such projects, it is of paramount importance that lenders holding stressed real estate projects conduct a thorough evaluation and strategy formulation before approaching NCLT. On the flip side, the presence of one single lender may enable such lender to hijack the insolvency resolution process of the CD. Furthermore, the voting process implies that the decision taken by 50% of the home buyers in value will constitute the decision of the home buyers as a block and all other home buyers are bound by such decision. In such circumstances, a disgruntled home buyer, who is dissatisfied with the decision of the remaining home buyers is likely to litigate such decision, thereby leading to delays.

Accordingly, it would be beneficial to the resolution process if the resolution professional were to assist the home buyers in reaching a middle ground in relation to the contentious issues and adopt a homogeneity in their approach so as to avoid any litigation and ensure that the interests of all the homebuyers are aligned and protected to the greatest extent possible.

06

Way Forward to Resolving Insolvencies in Real Estate Sector

The Way Forward

A business going under is always an unfortunate and painful event for all stakeholders. Real estate insolvencies can be particularly cumbersome to resolve as discussed.

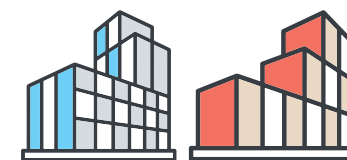
In this section below, we discuss our key observations in dealing with CIRP in real estate.



Splitting of assets likely to aid resolution of developers with multiple assets facing insolvency

We believe that the recent amendment that allows a resolution professional / CoC to split the assets of a CD and invite separate resolution plans for each asset is a landmark one as it enables different prospective resolution applicants to bid for separate assets depending on their focus / strength areas like preferred geography, asset type and nature of development.

In fact, in the real estate sector, thanks to the judgment of NCLAT in Umang Realtech and other similar judicial precedents, the courts / tribunals have allowed the insolvency resolution of individual projects of a real estate company as opposed to insolvency resolution of the CD as a whole. This appears to be an implied acknowledgement of the fact that in case of a real estate company, it is best to resolve the insolvency of a CD at a project / asset level, rather than at an entity level. This is further evidenced by the discussion paper dated 14th June 2022 issued by the Insolvency and Bankruptcy Board of India (IBBI) dated 14th June 2022, where the IBBI invited public comments on whether the stress in a real estate company should be resolved at the level of the project, tower or entity.



NCLT remains the preferred vehicle to address insolvencies

Any strong legal action to recover bad loans is the last refuge for a lender as the incumbent management is usually best positioned to work with the defaulting entity as a going concern – both in terms of familiarity with the business and in alignment of interests. However, lenders often face an inescapable dilemma to enforce their interest to recover monies considering the fiduciary responsibility they hold towards the capital they represent. In such instances, the key approaches to a recovery are:

- Sell down the loan to an ARC
- Takeover the asset under SARFAESI and auction the same
- Initiate CIRP against the insolvent company under section 7 of the IBC

While a sale to an ARC is not exclusive with other legal avenues available, it can potentially lead to lower realisation for the lender and merely represent shifting of ownership without a real resolution. Between SARFAESI and IBC, IBC clearly scored better (at least initially) on recovery rates and on timelines. However, with an excessive workload of cases (amidst thinning bench strength at NCLTs) there have been delays in resolution recently.

Regardless, IBC remains a preferred regulation for recourse to lenders given that all liabilities associated with the business / asset are pre-determined and resolution mechanism is pre-agreed. This is especially critical in case of real estate where new claimants (especially in form of allottees) can emerge post resolution.



A robust data room is critical

A real estate development will usually have a large number of approvals required through its project cycle from the local government bodies. Furthermore, the approvals often require revalidation given the time bound manner of approvals or change in extant regulations.

Hence, to maximise the recovery of the asset, it is critical that the lender / resolution applicant facilitate a prospective resolution agent with authenticated and updated information on the project. Given the time bound process of NCLT, it may be advisable for lenders to prepare the data room well ahead of admission of a CD into CIRP.



Resolution plans must be balanced

The winning resolution plan is usually determined by the CoC through a voting process. While OCs do not have a say in CoC, home buyers do have a say in a real estate insolvency with their voting rights as a special class of creditors.

Furthermore, it has been seen that courts may take a lenient view towards home buyers, especially if the lender has not been diligent in its lending or asset monitoring practises. Hence, while the law may provide for certain powers to the CoC, it is worthy to consider a resolution plan which is less likely to be litigated. It has also been seen in a particular case where the home buyers have been left entirely unaffected, which itself became a point of litigation with the litigant alleging undue favours to this class of creditors.



Development of an appropriate eco-system

We believe that resolving real estate insolvencies require greater support of the ecosystem than is required in most other industries.

We believe that if judicial bodies were to provide directions to the relevant authorities to provide requisite support in terms of information sharing and expeditious approvals, the resolution process will witness far superior outcomes than is currently evidenced.



Lending practices to evolve

The cycle of boom and bust in real estate has left the industry landscape waylaid with many stressed developers and defunct projects. The pain witnessed has led to many lenders turning cautious on the industry.

However, as lenders warm up to the sector again, we believe important learnings have been gained by the lenders. Most important in these are with respect to ring fencing a project from other projects of the developer and ensuring that the lender maintains records of all projects related documents to enable a smoother transition in an unfortunate, unforeseen credit event.

Conclusion

The first 5 years of the IBC has resulted in creation of a robust framework for resolution of distressed assets in a timely manner and has helped in tackling the problem of bad loans as well as improvement in overall credit culture in the country. Having said that the challenges faced in resolution of real estate assets in distress requires more proactive approach on the part of stakeholders including the financial creditors as well as home buyers to work in a coordinated manner to deal with such situations.

In addition, the Adjudicating Authority / judiciary would also be required to meaningfully direct all concerned (including government authorities associated with such projects) to fully cooperate in resolution of such assets considering the public interest element at stake.



07 Appendices

APPENDIX A



Khaitan & Co is a top tier and full-service law firm with over 1,000 legal professionals, including 220 Partners and Counsel, and presence in India and Singapore. With more than a century of experience in practicing law, we offer end-to-end legal solutions in diverse practice areas to our clients across the world. We have a team of highly motivated and dynamic professionals delivering outstanding client service and expert legal advice across a wide gamut of sectors and industries.

OUR JOURNEY

The Firm was established in 1911 by Late Debi Prasad Khaitan, a member of the Constituent Assembly of India and one of the seven members of the Drafting Committee which framed the Constitution of India. Our foundation rests on the pillars of integrity, simplicity, dedication and professionalism, upholding our commitment of being 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 take pride in our steady growth over the decades, from our first office in Kolkata (1911) to setting up operations in New Delhi (1970), Bengaluru (1994), Mumbai (2001), and Chennai and Singapore (2021). As one of India's largest and prominent law firms, we celebrated our centenary year on 11th November 2011.

OUR CLIENT CENTRIC APPROACH

We serve clients across all practice areas such as foreign direct investments (inbound and outbound), mergers and acquisitions, insolvency and restructuring, private equity investments, joint ventures and collaborations, tax (direct and indirect), capital markets, white collar crime, real estate, infrastructure, employment, competition and anti-trust, intellectual property, banking and finance etc. The Firm's clientele has a blend of business and financial enterprises, government bodies, educational and charitable trusts, individuals, and estates.

OUR PEOPLE

Our team of legal practitioners possess deep expertise across diversified practice areas, sectors, international experience, robust subject-matter, and jurisdictional knowledge. Over the years, our Firm has attracted and retained some of the best legal talent in India to provide high quality legal counsel in all spheres of commerce and industry. In addition to offering a broad spectrum of legal expertise to clients, we also ensure personal attention, prompt, and quality service. Our teams across all offices collectively bring in their expertise and collaborate as one group when involved simultaneously in any transaction, thus catering to our clients' needs across the globe.

OUR VALUE PROPOSITION

To best serve our clients, and to build and maintain long-term relationships, we ensure:

- Timely and commercially viable solutions to complex business and legal issues
- An integrated and solution-oriented approach in our engagements
- Expert advice by a multifaceted group of specialised legal professionals with a blend of both international and Indian work experience
- Best practices by leveraging cutting edge technological support and knowledge management methods
- Global coverage through regular legal, regulatory, and procedural updates that are critical for clients

To know more about our Firm, visit www.khaitanco.com

APPENDIX B



At **ANAROCK Capital Advisors**, our dedicated team of experienced and trustworthy professionals understand and align your business goals with the best opportunities prevalent. Our unrivalled expertise lies in designing and executing investment strategies that provide superior returns for our clients.

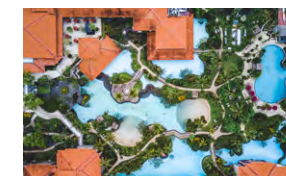
Our bespoke Real Estate Investment Banking solutions, not only **'Connect Asset to Capital'**, but ensure that your financial journey is seamless and hassle-free.

OUR SERVICES



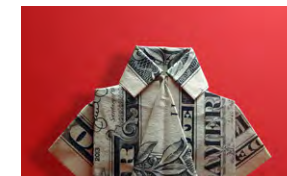
CAPITAL MARKETS

- Asset /Land Divestment
- Investment Sale
- Equity Raising (SPV)
- Equity Placement
- Fund Raising
- Portfolio Sale
- Buy Side Advisory
- Private Wealth Advisory
- REIT Advisory
- Alternatives / Shared Economies
- Joint Development (JD)
- Joint Venture (JV)
- Development Management (DM)



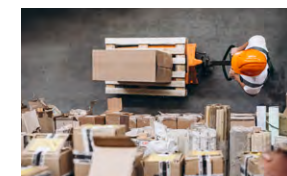
HOSPITALITY

- Transaction Advisory
- Consulting & Valuation
- Asset Management
- Executive Search



CORPORATE FINANCE

- Debt Advisory
- Stressed Assets Resolution Practice
- Buy Side Advisory
- Merger & Acquisition Advisory



INDUSTRIAL & LOGISTICS | DATA CENTRES

- Fund Raising
- Debt Finance
- Land Sale
- Asset Sale & Portfolio Sale
- Brokerage & Tenant Representation (Owner & Occupier Services)
- Buy Side Advisory
- Development Advisory
- Financial Feasibility & Asset Valuation

For more information, please visit www.anarock.com

Khaitan & Co is a top tier and full-service law firm with over 1,000 legal professionals, including 220 Partners and Counsel, and presence in India and Singapore. With more than a century of experience in practicing law, we offer end-to-end legal solutions in diverse practice areas to our clients across the world. We have a team of highly motivated and dynamic professionals delivering outstanding client service and expert legal advice across a wide gamut of sectors and industries.

To know more about our Firm, visit
www.khaitanco.com

ANAROCK is India's leading independent real estate services company with a presence across India and the Middle East. The Company has diversified interests across the real estate lifecycle and deploys its proprietary technology platform to accelerate marketing and sales. The ANAROCK services suite includes Residential Broking & Technology, Retail (in partnership with Vindico), Commercial, Investment Banking, Hospitality (in partnership with HVS), Land Services, Industrial and Logistics (in partnership with Binswanger), Investment Management, Research, Strategic Advisory & Valuations and Project Management Services (in partnership with Mace), Flexi Spaces (in partnership with myHQ & Upflex) and Society Management Services (acquisition of ApnaComplex-India/ANACITY-EMEA). ANAROCK has a team of over 2,200 certified and experienced real estate professionals who operate across all major Indian and Middle East markets. ANAROCK also manages over 80,000 established channel partners to ensure global business coverage.

For more information, please visit www.anarock.com

CONTRIBUTORS



Kumar Saurabh Singh
Partner
Khaitan & Co



Sudip Mullick
Partner
Khaitan & Co



Ashwaj Ramaiah
Senior Associate
Khaitan & Co



Rohitesh Tak
Associate
Khaitan & Co

AUTHOR



Aashiesh Agarwal
Sr. Vice President
Investment Advisory & Research
ANAROCK Capital

CONTRIBUTOR



Janet Pottakaran
Sr. Associate – Research
ANAROCK Capital

DESIGNER



Dr. Paridhi Gupta
Vice President – Design
ANAROCK Capital

FOR BUSINESS ENQUIRIES, PLEASE CONTACT

Kumar Saurabh Singh
Partner, Khaitan & Co
kumarsaurabh.singh@khaitanco.com

Sudip Mullick
Partner, Khaitan & Co
sudip.mullick@khaitanco.com

Khaitan & Co.
One World Centre, 10th & 13th Floor, Tower 1C
841 Senapati Bapat Marg, Mumbai - 400 013, India
+91 22 6636 5000



Shobhit Agarwal
MD & CEO, ANAROCK Capital
shobhit.agarwal@anarock.com

ANAROCK Capital Advisors Pvt. Ltd.
1002, 10th Floor, B Wing, G Block, ONE BKC
Bandra Kurla Complex, Bandra (E)
Mumbai - 400 051, India
+91 22 4293 4206

