

Parth Birla & Chirag Motwani, *Safeguarding Home Buyers Rights: A Comprehensive Analysis of Legal Framework in Real Estate Insolvency*, 10(2) NLUJ L. REV. 74 (2024)

**SAFEGUARDING HOME BUYERS' RIGHTS: A COMPREHENSIVE
ANALYSIS OF LEGAL FRAMEWORK IN REAL ESTATE INSOLVENCY**

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ABSTRACT

The Insolvency and Bankruptcy Code was introduced as a groundbreaking law to revitalize financially troubled corporations from the situations of bankruptcy and insolvency. The legislation, with its time-constrained methodology and the goal of reviving the debtor, initiates a process of Corporate Resolution in India. The Code has undergone significant changes due to the changing requirements of the economy. One such sector of the economy is real estate, which is the driving force of the economy but is currently in shambles and the homebuyers are the worst sufferers. Initially, in the Code, the rights of homebuyers were overlooked and not acknowledged. They encountered a challenging struggle to obtain recognition for their rights and finally were granted the designation as Financial Creditors. Nevertheless, there were unresolved uncertainties over the implementation of their demands and entitlements. To successfully address their concern, the court introduced innovative concepts of the Reverse CIRP and Project-Wise Insolvency to tackle the challenges at hand. The processes have been botly contested and found to be

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against Section 29A of the Code while standing upon the stilts of economic experimentation. Along with that, analyzing the nations with good ecosystems and their insolvency mechanisms provides key insights into insolvency governance and introduces the practices prevailing in the world. This piece seeks to explore the rights of homebuyers while analyzing the innovative approach of the courts in addressing their requirements. It also examines the practices in different countries to offer answers tailored to the Indian context and suggests possible paths ahead in the real estate sector's insolvency.

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I. INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (“**IBC**”) has been a landmark development in the Indian Corporate Regime and has been a product of the suggestions delineated by the Bankruptcy Reform Committee in 2014.¹ It was enacted to primarily provide a creditor-friendly and time-bound efficient resolution mechanism in the Indian landscape. Creditors can be referred to as the main engine force in the commencement of the insolvency resolution process under IBC. It engenders two types of creditors namely, *operational creditors* and *financial creditors* (may be secured or unsecured), the main difference among them is the peculiarity of financial creditors i.e., their sole financial relation with the debtor. In contrast, operational creditors are those creditors that partake in a transaction creating a debt. Moreover, a key feature of all financial debt as explained under Section 5(8)(f) of IBC² is that it must comprise disbursements against the “*time value of money*”, which has been a chief component in real estate investment. Recently, the Insolvency and Bankruptcy Board of India (“**IBBI**”) has allowed the Committee of Creditors (“**CoC**”) to instruct the Resolution Professional (“**RP**”) to create a separate resolution plan for every project after the company modified the rules governing the Corporate Insolvency Resolution Process (“**CIRP**”). When a corporate debtor is

¹Vatsal Khullar, *Report Summary – Bankruptcy Law Reforms Committee*, PRS LEGISLATIVE RESEARCH (Dec. 1, 2015), https://prsindia.org/files/policy/policy_committee_reports/1448943398_Report%20Summary%20-%20BLRC.pdf.

²The Insolvency and Bankruptcy Code 2016, §5(8)(f), No. 31, Acts of Parliament, 2016 (India).

involved in real estate development, IBBI has additionally demanded that the Resolution Professional/Insolvency Resolution Professional (**RP/IRP**) maintain separate bank accounts for each real estate project.³ The growing field of real estate insolvency in the recent past has induced deliberations around the delayed projects due to the insolvency mechanism and rights of the homebuyers.

The real estate industry plays a crucial role in propelling economic expansion in India, making significant contributions to the country's GDP, employment creation, and inflow of foreign investment. The introduction of IBC has had a significant impact on the homebuyers of a real-estate project, who are among the most impacted class. This is so as homebuyers typically invest a significant portion of their savings or take on substantial debt to purchase property and when the developer is unable to complete project on time, they may lose their deposits or advance payments, leading to substantial financial losses. As per the latest Economic Survey presented in the budget, *"It was estimated that 4.1 lakh dwelling units in real estate projects across the country involving ₹4.1 lakh crore were under stress."*⁴ One of the notable developments was in 2018 when the Parliament used a deeming fiction to bring *"allottees"* under a real estate project within the scope of the definition

³ KR Srivats, *Boosting real estate recovery: IBBI launches 'project-wise resolution' initiative*, HINDU BUSINESS LINE (Feb. 2, 2024, 4:55 PM), <https://www.thehindubusinessline.com/economy/boosting-real-estate-recovery-ibbi-launches-project-wise-resolution-initiative/article67854280.ece>.

⁴ *How This Code is Helping Homebuyers: Economic Survey Explains*, THE ECONOMIC TIMES (JUL. 22, 2024), <https://economictimes.indiatimes.com/industry/services/property/-construction/how-this-code-is-helping-homebuyers-economic-survey-explains/articleshow/111925464.cms?from=mdr>.

of “financial creditor”.⁵ The change was executed by inserting an ‘Explanation’ to Section 5(8)(f) which defines “*financial debt*”. 2018 was also accompanied by The Insolvency Law Committee's Report of 2018⁶ that underlined real estate projects in India were frequently prolonged and stated that this was a sector-wide problem throughout the nation. Albeit the report appreciated the inclusion of allottees as financial creditors, however, it also highlighted a concerning fact that out of 782 real estate projects in India, 215 had undergone delays ranging from 1 month to 261 months.⁷ Despite bearing the tag of “financial creditor”, the discourse surrounding homebuyers as a class of creditors has been always debatable. However, there is another emerging question concerning, “*Whether Homebuyers are secured financial creditors or unsecured financial creditors*”. This is due to the secured financial creditors being given a preference under the waterfall mechanism.⁸ The piece argues and strives to establish that homebuyers should be placed under the category of secured financial creditors. To strengthen the insolvency process in the real estate sector, new events such as Reverse CIRP and Project-wise insolvency have come to the fore for seamless insolvency resolution in the real estate sector, yet there are some challenges that need to be overcome to achieve success

⁵ The Insolvency and Bankruptcy Code (Amendment) Act, 2018 (Act No. 08 of 2018), Acts of Parliament, 2018 (India).

⁶ *Report of the Insolvency Law Committee*, MINISTRY OF CORPORATE AFFAIRS, Government of India (Feb. 2020), https://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf.

⁷ Khyati Rathod & Niharika Dhall, *India: Delays in Construction Projects*, MONDAQ, (Jan.06 2024, 4:56 PM), <https://www.mondaq.com/india/construction--planning/562100/delays-in-construction-projects>.

⁸ The Insolvency and Bankruptcy Code 2016, §53, No. 31, Acts of Parliament, 2016 (India).

through this novel concept. The process was developed with the motive to safeguard the interests of real estate project allottees, whose goals of obtaining ownership of the apartment/home conflict with those of other creditors who are concerned about their money being repaid.⁹ In this piece, the authors endeavor to analyze the viability of Reverse CIRP while exploring possible paths that would also include a cross-jurisdictional analysis of the real estate sector in different economies.

II. DELAYED DELIVERIES AND DISTRESSED BUYERS: EXAMINING THE FALLOUT OF IBC ON HOME BUYING EXPERIENCES

The below-par execution of the IBC led to an intense struggle for the rights and interests of homebuyers. One such zone of concern for homebuyers pertains to the periodic payments for their future homes. The standard process in residential apartment purchases has been the homebuyers making periodic payments to project developers, who are then expected to deliver completed flats/homes on a specified date. In many cases, the developers become insolvent, either owing to economic collapse or the diversion of pre-payments received towards other uses, leaving homeowners stranded without refunds for flats. The homebuyers found themselves entangled in protracted legal battles, particularly in situations involving insolvent real estate developers.¹⁰ Additional factors such as

⁹ Aastha, *Homebuyers as Financial Creditors*, ARGUS PARTNERS, (Feb. 26th, 2024 4:45 PM), <https://argus-p.com/papers-publications/thought-paper/homebuyers-as-financial-creditors/>.

¹⁰ Souvik Ganguly, Renjith Nair and Altamash Qureshi, *Evolving Jurisprudence of Homebuyers under the Insolvency and Bankruptcy Code, 2016* LEXOLOGY, (Feb. 3, 2024)

delays in project completion, mishandling of funds, and a lack of transparency put a large number of homebuyers' interests in jeopardy. This was coupled with the oppression of the "rights" of the homebuyers as creditors which were reduced to the minimum.¹¹ The homebuyers were confronted with intrinsic hurdles within the IBC resolution process, making it an uphill struggle to safeguard their investments and fulfil their goal of homeownership. It is worthwhile to look at the plight of the homebuyers under the IBC regime since the real-estate sector acts as a driving force for the economy by contributing more than 50% of India's GDP.¹² Furthermore, it is the second biggest sector in which the CIRP proceedings are initiated and out of 2,298 CIRP cases, 518 cases pertain to the real estate sector.¹³ Despite being a focal point in the insolvency mechanism, the real estate industry has reflected underwhelming performance in the existing circumstances. It is noteworthy that just 78 out of 611 approved resolution plans pertain to the real estate industry, which marks the shady success of IBC in this sector,¹⁴ this is further exacerbated

<https://www.lexology.com/library/detail.aspx?g=d4256087-92a9-4d23-9616-5ec6f334317b>.

¹¹ Pranav Pathak, *Status of Homebuyers upon the anvil of IBC, 2016*, KHURANA AND KHURANA, (Feb.23, 2024), <https://www.khuranaandkhurana.com/2023/02/06/status-of-homebuyers-upon-the-anvil-of-ibc-2016/>.

¹² Hari Movva, *How the Indian real estate sector drives the nation's economy*, FINANCIAL EXPRESS, (Mar. 03, 2024, 3: 45 PM), <https://www.financialexpress.com/money/how-the-indian-real-estate-sector-drives-the-nations-economy-3017285/>.

¹³ Faizan Haidar, *Real estate firms stuck in insolvency courts have a slower resolution rate, study shows*, ECONOMIC TIMES, (Jan. 02, 2024), <https://economictimes.indiatimes.com/industry/services/property/-/cstruction/real-estate-firms-stuck-in-insolvency-courts-have-a-slower-resolution-rate-study-shows/articleshow/100580982.cms>.

¹⁴ Abhishek Arya, *Insolvency in Real estate sector: Issues and Challenges*, IBC LAWS (Jan.03, 2024), <https://ibclaw.in/insolvency-in-real-estate-sector-issues-and-challenges-by-abhishek-arya/>.

by the homebuyers filing more than 1,800 cases against builders under IBC since June 2018.¹⁵ As of June 2023, as per IBBI, a total of 392 real estate companies have been admitted into IBC, of which 188 companies have their CIRPs ongoing, and 204 CIRPs have been concluded, and merely 22 have resulted in a successful resolution by approval plans culminating in a meagre successful resolution percentage of 10.78%.¹⁶ This indicates the below-average performance of the real estate industry under the insolvency mechanism, in line with the objective of the IBC to revive the corporate debtor.

While the figures provided above demonstrate the difficulties faced by the homebuyers under IBC, there are numerous remedies available to them under various statutes to overcome the hindrances posed in the sector. In addition to civil suits, homebuyers have recourse under the Consumer Protection Act, 2019 (“CPA”), under which they can seek compensation. This is ineffective from the lenses of homebuyers as the remedy available to a dissatisfied customer under the CPA, 2019 is solely compensatory and not preventative.¹⁷ This is primarily due to the fact that the CPA, 2019 allows for monetary damages and compensation, and

¹⁵1,821 cases filed by homebuyers against builders under the Insolvency and Bankruptcy Code, PRESS INFORMATION BUREAU (NOV. 18, 2019), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=194587>.

¹⁶Avinash Subramaniam and Aditya Bhadra Ray, *Leading them up the Green Mile – Insolvency of Real Estate Companies*, AZB PARTNERS, (Mar. 04, 2024, 4: 45 PM) <https://www.azbpartners.com/bank/leading-them-up-the-green-mile-insolvency-of-real-estate-companies/>.

¹⁷Prakash Panjabi, *Tri-remedial option available to homebuyers- an overview*, ARGUS PARTNERS (Jan.08, 2024, 4:23 PM), <https://argus-p.com/papers-publications/thought-paper/tri-remedial-option-available-to-home-buyers-an-overview/>.

excludes the relief of specific performance.¹⁸ Additionally in March 2016, the Real Estate (Regulation and Development) Act, 2016 (“**RERA**”) was enacted with a view to effectively regulate real estate projects. RERA provides for the regulation of real estate project developers, the creation of escrow accounts for monies collected from homebuyers, and the establishment of a regulatory authority with the power to impose penalties on developers and award refunds to homebuyers.¹⁹ Since homebuyers’ burdened with the provision of the moratorium because, after the commencement of the moratorium, no further claims/ suits can be initiated against the corporate debtor.²⁰ As a consequence, remedies available to homebuyers under RERA can’t be exercised and they are left with no recourse, within or outside the CIRP.²¹ Despite their best efforts, the journey to find a satisfactory solution to homebuyers' grievances concludes with an unfulfilled quest for effective recourse.

**A. JAYPEE INFRATECH LIMITED CASE STUDY: A MASSIVE
PREDICAMENT FOR HOMEBUYERS**

This is one of the most noteworthy instances for depicting the frustration caused to homebuyers. When Jaypee Infratech Limited (“**JIL**”), a real estate developer, filed for CIRP in August 2017, almost 30,000 homebuyers anticipated the fulfillment of their desire to own an

¹⁸ *Id.*

¹⁹ *What is the Real Estate Regulation Act (RERA)? Here is how it will help buyers*, INDIAN EXPRESS (May 01, 2017), <https://indianexpress.com/article/what-is/what-is-rera-and-how-will-it-help-homebuyers-4635705/>.

²⁰ Khare Uday, *Insolvency in Real Estate: A Difficult Balancing Act*, 1, 4-12 (JGILS Working Paper No. 3 / 2021, 2021), <https://deliverypdf.ssrn.com/delivery.php?ID=3970830940700250900841030941>.

²¹ *Id.*

apartment.²² Unbeknownst to them, the prolonged delay in completing the CIRP procedure exacerbated the unfortunate situation, escalating confusion and frustration instead of promptly resolving the issue. As per the IBC regime, it is mandated for CIRP to conclude within a maximum duration of 330 days²³ yet the purchasers have not received their homes despite the involvement of the Apex Court in the case.²⁴ The delay in this issue has gone beyond all boundaries since the settlement procedure *has already reached its seventh year in 2024*. The issue concerning homebuyers in the JIL case has taken a new route through the acquisition of JIL by the *Suraksha Group*. The Group is expected to inject funds into the project to offer respite to the homebuyers.²⁵ This is followed by a period of *7 years of hardship* endured by the homebuyers and yet the completion of the project is uncertain. This is not an isolated occurrence, as homebuyers have witnessed the same situation in many project developers' insolvencies such

²² Jeevan Prakash Sharma, *Five Years Of Jaypee Infratech Insolvency Case: Why Do Homebuyers End Up As The Biggest Losers?* BUSINESS OUTLOOK (Jan. 23, 2024, 4:55 PM), <https://business.outlookindia.com/news/five-years-of-jaypee-infratech-insolvency-case-why-do-homebuyers-end-up-as-the-biggest-losers--news-218988>.

²³ The Insolvency and Bankruptcy Code 2016, §12, No. 31, Acts of Parliament, 2016 (India).

²⁴ THE HINDU BUSINESS LINE, <https://www.thehindubusinessline.com/news/real-estate/jaypee-infra-insolvency-suraksha-group-to-infuse-250-cr-arrange-3000-crore-loan-to-complete-20000-flats/article66599969.ece>.

²⁵ *Jaypee Infra insolvency: Suraksha Group to infuse Rs 250 crore, arrange Rs 3,000 crore loan to complete 20,000 flats*, ECONOMIC TIMES (MAR. 09, 2023, 07:24 PM), <https://economictimes.indiatimes.com/industry/services/property/-construction/jaypee-infra-insolvency-suraksha-group-to-infuse-rs-250-crore-arrange-rs-3000-crore-loan-to-complete-20000-flats/articleshow/98522473.cms?from=mdr>.

as Ariisto Developers Pvt. Ltd,²⁶ Unitech Ltd,²⁷ Radius Estates & Developers Pvt. Ltd,²⁸ DS Kulkarni Developers Ltd,²⁹ Lavasa Corporation Ltd³⁰ etc. which denotes the pervasiveness of the issue.

III. TRAVERSING THE RIGHTS OF THE HOMEBUYERS IN THE REALM OF IBC

“The IBC, as it was originally enacted, did not contain an adequate recognition of the interests of home buyers in real estate projects. Home buyers are vital stakeholders. The process of corporate insolvency resolution directly impacts upon their rights and interests. Yet the IBC, as initially crafted, did not protect them.”³¹

The absence of any express acknowledgement of the distinctive status of homebuyers by the lawmakers under IBC led to a difficult situation in real estate insolvencies, thus the judiciary faced a herculean task in recognizing the rights of homebuyers under IBC in a harmonious

²⁶ Ashish Parwani *et al.*, *Rajani Acts For Ariisto Developers RP In \$220M Debt Resolution By Prestige Estates*, MONDAQ (Jan.2, 2024, 3:45 PM), [https://www.mondaq.com/india/real-estate/1110162/rajani-acts-for-ariisto-developers-rp-in-\\$220m-debt-resolution-by-prestige-estates](https://www.mondaq.com/india/real-estate/1110162/rajani-acts-for-ariisto-developers-rp-in-$220m-debt-resolution-by-prestige-estates).

²⁷ *Final Chance to Be Given to Unitech Buyers Seeking Refund to Reconsider Their Decision: SC*, ECONOMIC TIMES (Aug. 19, 2021), <https://economictimes.indiatimes.com/wealth/real-estate/final-chance-to-be-given-to-unitech-buyers-seeking-refund-to-reconsider-their-decision-sc/articleshow/85423897.cms?from=mdr>.

²⁸ *Adani nears purchase of bankrupt Mumbai builder at 98% discount*, LIVEMINT (Jan. 09, 2023) <https://www.livemint.com/companies/news/adani-nears-purchase-of-bankrupt-mumbai-builder-at-98-discount-11673280556771.html>.

²⁹ Pallavi Mishra, *NCLT Approves Resolution Plan For D S Kulkarni Developers, Homebuyers Will Get Flats Against Their Claims: NCLT Mumbai* LIVELAW (Jan. 04, 2024, 4: 55 PM), <https://www.livelaw.in/ibc-cases/national-company-law-tribunal-approves-resolution-plan-ds-kulkarni-developers-231589>.

³⁰ *NCLT approves ₹1,814-crore resolution plan for Lavasa; Darwin Platform winning bidder*, THE HINDU BUSINESS LINE (Jul. 22, 2023), <https://www.thehindubusinessline.com/news/nclt-approves-1814-crore-resolution-plan-for-lavasa-darwin-platform-winning-bidder/article67108975.ece>.

³¹ Chitra Sharma v. Union of India, Writ Petition (Civil) No.744 of 2017.

manner. Moreover, despite repeated attempts to address the omission of homebuyers' status and conferring due consideration to their rights, the changing situation of real estate bankruptcies remained a hurdle for the judiciary in guaranteeing equitable and prompt solutions for the impacted homebuyers.

Initially, the homebuyers were excluded as financial creditors under the IBC regime by the courts³² marking it as an early occurrence of disenfranchisement of the homebuyers. In reaction to this, there was a natural inclination of homebuyers to seek the position of "*operational creditors*" under the IBC framework, but the court denied them the status of operational creditors as well.³³ It was reasoned that the payment made to the developer does not meet the criteria for being classified as operational debt, since it does not pertain to a claim related to the provision of products or services, employment dues, or statutory dues owed to the government or a local authority.³⁴ The court considered homebuyers as financial creditors only in those instances wherein there was an express contract between the parties providing home buyers with guaranteed assured returns by the developer.³⁵ The recognition of homebuyers' rights was based upon narrow stilts of interpretation by the judiciary resulting in the homebuyers not being effectively recognized under the insolvency framework. The dismay persisted till 2018 when the legislature, through an amendment,

³² Nikhil Mehta and Sons v. AMR Infrastructure Ltd., (2017) SCC OnLine NCLAT 859.

³³ Col Vinod Awasthy v. AMR Infrastructure Ltd., (2017) SCC Online NCLT 16278, Pawan Dubey v. JBK Developers Pvt. Ltd., (2017) SCC OnLine NCLT 520.

³⁴ *Id.*

³⁵ Anil Mahindroo v. Earth Organics Infrastructure, (2017) SCC OnLine NCLAT 216.

conferred homebuyers the status of financial creditors.³⁶ The much needed development was recommended by the report of the Insolvency Law Committee, clarifying that “*Given the confusion and multiple interpretations...it may be prudent to explicitly clarify that such creditors fall within the definition of financial creditor.*”³⁷ The amendment turned out to be a watershed moment for the rights of the home-buyers and inserted an explanation to Section 5(8)(f) that states, “*any amount raised from an allottee under a real estate project shall be deemed to be an amount having the **commercial effect of a borrowing.***” Homebuyers' status as financial creditors confer significant legal and financial benefits, including preference in insolvency proceedings, representation in the Committee of Creditors, and legal recourse under RERA. This classification is justified by the substantial financial contribution of homebuyers to real estate projects, often amounting to 50-100% of project funding, making their involvement in decision-making essential for safeguarding their investments.³⁸

Interestingly, the amendment raised more questions than answers and eventually, the validity of the 2018 amendment was challenged before the Supreme Court and was upheld In the landmark *Pioneer Urban case*.³⁹ The Apex Court observed that “*the expression borrow is wide enough to include an advance given by the homebuyers to a real estate developer for “temporary use”, i.e. for use in the construction project so long as it is intended by the agreement to give “something*

³⁶ *Supra* note 3.

³⁷ *Supra* note 4.

³⁸ *Pioneer Urban Land and Infrastructure Limited v. Union of India*, (2019) 8 SCC 416.

³⁹ *Id.*

*equivalent” to money back to the homebuyers.”⁴⁰ The judiciary, which initially deprived homebuyers of their rights, by validating the amendment adopted a stance that prioritized the protection of their interests. The judiciary, *via* a multitude of verdicts, has played a pivotal role in advancing the rights of homebuyers. First of all, the National Company Law Appellate Tribunal (“**NCLAT**”) showed a proactive approach by allowing a single RP to complete CIRP against numerous companies.⁴¹ The objective was to efficiently execute a real estate project without imposing unwarranted limitations on the rights of the homebuyers. This aligns with the stance taken by the Supreme Court in promoting the rights of homebuyers. Later, in *Committee of Creditors of Essar Steel India Ltd. v/s. Satish Kumar Gupta & Others (2020)*,⁴² it was held that the infringement by National Company Law Tribunal (“**NCLT**”) and NCLAT upon an approved plan of the CoC, is not permissible. This is so because the CoC possesses its commercial wisdom and accordingly when a plan is approved by the CoC, it should not be interfered with by the judiciary which was done with a view of speedy resolution for homebuyers.⁴³ Moreover, in *Ireo Grace Pvt. Ltd. v/s. Abhishek Khanna and Others (2021)*,⁴⁴ the court resolved a doubt concerning whether the remedies available to the homebuyer under IBC, RERA and CPA are concurrent and answered in the affirmative provided that the remedies can*

⁴⁰ *Id.*

⁴¹ *Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd.*, (2019) SCC OnLine NCLAT 592.

⁴² *Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta*, (2020) 8 SCC 531.

⁴³ *Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd.*, (2022) 1 SCC 401, *Alok Kaushik v. Bhuvaneshwari Ramanathan*, (2021) 5 SCC 787.

⁴⁴ *Ireo Grace Realtech (P) Ltd. v. Abhishek Khanna*, (2021) SCC OnLine SC 3403.

be pursued simultaneously. The Apex Court also widened the ambit of homebuyer by providing that the allottee apart from the general transfer by sale also includes the transfer by the developer by other means as well and also includes such transfers wherein the land is sold on leasehold.⁴⁵

IV. THE AFTER-EFFECTS OF THE 2018 AMENDMENT

Although the courts have demonstrated a favorable attitude towards homebuyers through above rulings, the amendment which classified them as financial creditors had ripple effects. It is important to examine that amendment in light of the principles of the IBC to ensure a fair and effective resolution of developers' indebtedness. The principal concern revolves around the conflict between CoC on the lines of business acumen and the interests of the homebuyers. The Supreme Court, in its previous rulings, has consistently restricted its power of judicial review over the decisions of the CoC and has emphasized its supremacy based on its "*business acumen*".⁴⁶ This raises questions about the essence of IBC and CoC as they consist of individuals with strong financial expertise who participate in the resolution process. While the inclusion of authorized representatives⁴⁷ of homebuyers ensures their participation, it remains to be seen whether they can actively contribute to the smooth resolution process or not. Further, if they could provide accurate financial information to homebuyers in the long term to effectively utilise the resolution process, the consistency of such practices has to be keenly observed.

⁴⁵ Manish Kumar v. Union of India, (2021) 5 SCC 1.

⁴⁶ K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150, Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta, (2020) 8 SCC 531.

⁴⁷ *Supra* note 3.

The inclusion of homebuyers as financial creditors had a profound effect, particularly in terms of conflicting interests with other classes of creditors. Typically, the homebuyer who invests his life-long savings in purchasing a flat/home would prioritize its completion, even if it conflicts with the interests of other creditors (who are more inclined to get refunds). The Supreme Court has accentuated in the JIL case that, **merely 8% of the home buyers have requested a return of their money, while the remaining 92% want to take possession of the properties they desired.**⁴⁸ Further, the court went on to protect the interests of the majority of homebuyers (92%), many of whom have also acquired loans to purchase a property.⁴⁹ Thus, the inclination of homebuyers towards specific performance in various scenarios might directly contradict the vested interest of other classes of creditors and perhaps undermine the creditor-friendly approach under IBC. Often, the only viable course of action is to proceed with the liquidation of the corporate debtor. The homebuyers who have invested their life savings might not be in a position to afford a “haircut” during the process of liquidation. A haircut can be defined as the difference between the total amount that could be claimed and the final amount received.⁵⁰ This grievance has been well recognized in the landmark case of *Chitra Sharma*⁵¹ wherein the court observed that “Liquidation would leave the home buyers to face an uncertain future. The disposal of assets would, it is

⁴⁸*Supra* note 30.

⁴⁹ *Id.*

⁵⁰ *Banks took a haircut of 69 per cent while resolving IBC cases: Report*, BUSINESS STANDARD (Aug. 25, 2022), https://www.business-standard.com/article/finance/banks-took-a-haircut-of-69-per-cent-while-resolving-ibc-cases-report-122082500248_1.html.

⁵¹ *Id.*

apprehended, deprive them of their right to own a home. Faced with a situation of human distress, occasioned by the failure of the developers to meet their contractual obligations and a legal regime as it then stood under the IBC which provided no solace to home buyers.” It was a timely observation which in turn became of great significance as it highlighted the plight of the homebuyers and acted as a precursor to the 2018 amendment. Typically, haircuts result in a significant reduction in the amount owed to creditors. Generally, this reduction has been as much as 80%,⁵² and in rare situations, it has even reached as high as 95%.⁵³ These are the sums that homebuyers cannot accept as refunds due to their preference for flats/homes that are built using their hard-earned money. Experiencing haircuts is a distressing experience for homebuyers and can have cascading effects on the overall economy.

A. CHANGE IN LIQUIDATION LANDSCAPE

Recently, The IBBI has notified an amendment that provides that after the property is transferred to the allottees, assets in a real estate project are discharged from the process of liquidation. The notification stated, *“For the purposes of clause (e) of sub-section (4) of section 36, wherever the corporate debtor has given possession to an allottee in a real estate project, such asset shall not form a part of the liquidation estate of the corporate debtor.”*⁵⁴ This implies that even in the

⁵²Gopika Gopakumar, *Banks get raw deal as top bankruptcy resolutions see 80% average haircuts*, LIVEMINT (Jan.02, 2024, 3:23 PM), <https://www.livemint.com/industry/banking/banks-see-80-average-haircut-in-top-nclt-bankruptcy-resolutions-11623956020366.html>.

⁵³ Simran Lunagariya & Priyanshi Jain, *Rising Haircuts: A Death Knell for the IBC*, INDIA CORP LAW (Jan.23, 2024, 2:45 PM), <https://indiacorplaw.in/2022/03/rising-haircuts-a-deathknell-for-the-ibc.html>.

⁵⁴ Vandana Ramnani, *Relief for homebuyers: Allotted flats will not be part of liquidation process, says insolvency and bankruptcy board*, HINDUSTAN TIMES (Mar.07, 2024, 4:56 PM), <https://www.hindustantimes.com/real-estate/relief-to-homebuyers-allotted-flats-will->

event of the builder's liquidation, a buyer who has already been granted possession of a property can retain it. This is a welcome development from the Board since it assures a homebuyer against the fear of their property going into the process of liquidation. However, the effectiveness of this amendment needs to be closely monitored because most of the real estate projects are stalled in their initial stages and the possession of the flats never gets transferred to the homebuyers.

B. THE DILEMMA OF HOMEBUYERS AS SECURED CREDITORS

Allowing the homebuyers to retain the property in the process of liquidation further intensifies the discussion over the status of homebuyers. The status of homebuyers as financial creditors, i.e. whether they are secured or unsecured creditors needs to be resolved. This is so because the secured creditors have a better positioning under the *waterfall mechanism*⁵⁵ as compared to unsecured creditors during the liquidation process. The waterfall mechanism as provided under Section 53 of the IBC ensures a structured and prioritized approach to distributing the assets of a corporate debtor among its various creditors and stakeholders, while the secured financial creditors get second preference under the waterfall mechanism the unsecured financial creditors get fourth preference.⁵⁶ In a situation where the homebuyers are regarded as unsecured financial creditors, it would mean levying double jeopardy upon the homebuyers. This is so because

not-be-part-of-liquidation-process-says-insolvency-and-bankruptcy-board-101708185884552.html.

⁵⁵ The Insolvency and Bankruptcy Code 2016, §53, No. 31, Acts of Parliament, 2016 (India).

⁵⁶ *Id.*

neither they can get their homes nor a full refund whereas granting the status of secured financial creditors would help homebuyers as well as the economy positively.⁵⁷ In the *Amrapali Insolvency case*,⁵⁸ the Apex Court *inter-alia* addressed the argument put out by the banks that homebuyers are not secured creditors and so they do not have any rights. In response, the court determined that the aforementioned arguments are flawed with respect to RERA. The court ruled that though they are not secured creditors, they are entitled to fair treatment in line with law and they cannot be subjected to fraudulent actions by the promoters.⁵⁹ The court **prioritized the claims of the homebuyers over the banks and other authorities** which became one of the milestone events and ignited a discourse concerning the status of the homebuyers as secured creditors.⁶⁰ A close observation of the provisions of RERA and their interpretation would help better understand the claims of homebuyers as secured financial creditors. According to Section 11(4)(h) of RERA,⁶¹ it is not allowed to form a mortgage on units for which the promoters/developers have already inked an agreement to sell. Even if such a mortgage is created, it will not impact the rights and interests of the homebuyer involved. Also, as per the second proviso of

⁵⁷Conor Sen, *Squeezed Homebuyers Are Just What the Economy Needed*, BLOOMBERG (Jan.24, 2024, 5:52 PM), <https://www.bloomberg.com/opinion/articles/2023-06-29/squeezed-homebuyers-are-keeping-the-us-economy-from-recession>.

⁵⁸ *Bikram Chatterji v. Union of India*, (2021) 15 SCC 625.

⁵⁹ *Id.*

⁶⁰ Ashwini Kumar Sharma, *Buyers in Amrapali Group see light at the end of the tunnel*, LIVEMINT (Jan.24, 2024, 3:45 PM), <https://www.livemint.com/money/personal-finance/buyers-in-amrapali-group-see-light-at-end-of-tunnel-1564420927191.html>.

⁶¹ Real Estate (Regulation and Development) Act, 2016, §11(4)(h), No. 16, Acts of Parliament, 2016 (India).

Section 8 of RERA,⁶² if the registration of a real estate project under RERA is revoked, the association of homebuyers has the first prerogative to undertake the remaining development work. While these claims of the homebuyers as secured financial creditors need to be given due consideration, a legislative response to the various issues surrounding the status of homebuyers as financial creditors would be a welcome development.⁶³ The aforementioned consequences and proposals contribute to the promotion of homebuyers' rights. It is essential to also consider the interests of other stakeholders to enable a smooth settlement of disputes within the insolvency mechanism. Initiatives such as "*Reverse CIRP and Project wise Insolvency*" has been suggested to address the concerns of all stakeholders in a manner that is consistent with the objectives of the IBC.

V. REVERSE CIRP: A VIABLE MECHANISM?

The concept of Reverse CIRP was devised to safeguard the interests of the homebuyers of real estate projects, whose objective of obtaining possession of the flat/homes clashed with the objectives of other financial creditors who were primarily concerned with their money getting repaid. In light of the distinctive circumstances faced by homeowners, the NCLAT in the *Flat Buyers Case*⁶⁴ introduced this novel approach. Even

⁶² Real Estate (Regulation and Development) Act, 2016, §8, No. 16, Acts of Parliament, 2016 (India).

⁶³ Aditya Khadria and Sivaprakasam Babu, *Are home buyers secured financial creditors or unsecured creditors under IBC?*, ELP (Jan.24, 2024, 4:32 PM), https://elplaw.in/wp-content/uploads/2018/10/IBC_-_Home-buyers_-Are-home-buyers-secured-financial-creditors-or-unsecured-creditors-under-IBC_.pdf.

⁶⁴ Flat Buyers Association v. Umang Realtech (P) Ltd., (2020) SCC OnLine NCLAT 1199.

though homebuyers are now considered financial creditors, NCLAT opined that they lack the necessary business acumen/commercial wisdom to comprehend the feasibility of a resolution plan and thus the court resorted to the idea of Reverse CIRP. “Reverse insolvency is a promoter-driven process as it requires the promoters to fund the project to complete the construction and development of projects.”⁶⁵ This provides a chance for the promoter to revive the company and serve as a lender or financial creditor. The Hon’ble Supreme Court in *Anand Murti v. Soni Infratech Pvt. Ltd.*⁶⁶ and *Amit Katyal v. Meera Ahuja*⁶⁷ have upheld the principle of Reverse CIRP. Further, the Supreme Court reaffirmed the concept of Reverse CIRP along with Project-Wise Insolvency in the *Supertech Ltd case*.⁶⁸ This signifies that the promoter of the company is actively involved in the CIRP, but it only applies to initiating CIRP for the defaulted projects and completing the rest of the projects in a time-bound manner.⁶⁹

The genesis of the introduction of Reverse CIRP has been for the benefit of the interests of the homebuyers and at the same time it has positive implications towards the interests of the developers as well. Implementing Reverse CIRP offers two significant advantages. Firstly, the projects that are under significant financial strain which led to the

⁶⁵Pavan Burgula, *Reverse Insolvency for Realty yet to take place*, LIVEMINT (Feb.04, 2024, 4:22 PM), <https://www.livemint.com/news/india/reverse-insolvency-for-realty-yet-to-take-shape-11699028364836.html>.

⁶⁶ *Anand Murti v. Soni Infratech (P) Ltd.*, Civil Appeal No.7534 of 2021.

⁶⁷ *Amit Katyal v. Meera Ahuja*, (2022) SCC OnLine SC 346.

⁶⁸ *Indiabulls Asset Reconstruction Co. Ltd. v. Ram Kishore Arora*, (2023) SCC OnLine SC 612.

⁶⁹ Pavan Burgula, *Reverse Insolvency for Realty yet to take place*, LIVEMINT (Feb. 04, 2024, 4:22 PM), <https://www.livemint.com/news/india/reverse-insolvency-for-realty-yet-to-take-shape-11699028364836.html>.

insolvency of the corporate debtor might be addressed individually, which has been now recognised by the policymakers with the recent amendments.⁷⁰ Thus, the corporate debtor can prioritize its attention on other projects where it has not failed to meet its obligations. Secondly, a resolution that is appropriately tailored has a high chance of favourable outcomes, by assessing the current stage of the real estate project and the goals of the relevant parties involved, particularly for the allottees of the project.⁷¹ Although the Reverse CIRP offers potential benefits, it is crucial to thoroughly examine the consequences of the courts' unique strategy in order to effectively apply the mechanism.

One such implication has been the lack of rules/guidelines governing the process of Reverse CIRP. It is important to note that under Section 4(2)(1)(D) of RERA, seventy percent of the funds obtained for the real estate project must be allocated to an escrow account solely to cover project expenses.⁷² However, the courts have often neglected this criterion while dealing with the Reverse CIRP instances.⁷³ The court in the *Supertech Ltd. case* mandated the builder to transfer 70% of the amount to a distinct RERA account⁷⁴ and the allottees also appreciated this direction of the

⁷⁰Jeevan Prakash Sharma, *NCLAT's Relief To Supertech Ignites Builder Vs Homebuyer Debate On Bankruptcy Law*, BUSINESS OUTLOOK, (Jan.01, 2024, 2:55 PM), <https://business.outlookindia.com/news/sc-s-relief-to-supertech-ignites-builder-vs-homebuyer-debate-on-bankruptcy-law-news-206141>.

⁷¹ *Id.*

⁷² Real Estate (Regulation and Development) Act, 2016, §4(2)(1)(D), No. 16, Acts of Parliament, 2016 (India).

⁷³ Somvanshi, Janhavi and R, Samyuktha, *Reverse CIRP as an Emerging Solution to Real Estate Insolvency - Can It Be Accommodated in the Scheme of IBC?* (Jan.21, 2024, 4:43 PM), https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=4316565.

⁷⁴ *Supra* note 65.

court, however, it is being executed without any sound legal procedures. Implementing the Reverse CIRP procedure might still be an uphill battle for stakeholders and the judiciary due to the absence of a clear legal mandate for this new development. The absence of explicit legal backing and the uncertainty surrounding the regulations for carrying out the procedure may lead to the misappropriation of funds, compromising the integrity of the Reverse CIRP process. There are generally two distinct aspects of legal directives: rules (*ex-ante*) and standards (*ex-post*).⁷⁵ Rules provide a distinct and unambiguous distinction between what is permissible under the law and what is prohibited. Standards, however, are broad legal benchmarks that need thoughtful application by the judiciary. Standards may incur cheaper costs for their establishment compared to rules, nevertheless, their enforcement costs would be significantly more than those of rules.⁷⁶ Thus, while the judiciary has laid down the underlying concept of Reverse CIRP, now there is an urgent requirement for legislative interference. The amendment of the IBBI stipulates that in the event of a default by a real estate company, a Project-Wise Insolvency must be initiated but fails to provide any guidelines on Reverse CIRP.⁷⁷ As the judiciary only establishes a norm; it gives the executors no precise guidance on how to carry out Reverse CIRP. This might lead to an unusually high failure in the Reverse CIRP and more adverse consequences. Therefore,

⁷⁵ Kaplow, Louis. *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 615 (1992).

⁷⁶ *Id.*

⁷⁷ KR Srivats, *Boosting real estate recovery: IBBI launches 'project-wise resolution' initiative*, HINDU BUSINESS LINE (Feb.2, 2024, 4:55 PM), <https://www.thehindubusinessline.com/economy/boosting-real-estate-recovery-ibbi-launches-project-wise-resolution-initiative/article67854280.ece>.

pre-established rules must be urgently required to properly adopt this unique approach. The success of Project Wise Insolvency largely depends upon the inclusion of Reverse CIRP in the legislative framework since, both the processes are synergetic to each other. It is contended that Reverse CIRP goes against both the objectives of IBC and specifically against Section 29A of IBC.⁷⁸ Section 29A of the IBC precludes certain individuals, including promoters responsible for a company's insolvency, from submitting resolution plans during the CIRP. This provision aims to prevent those who contributed to the company's financial distress from circumventing the insolvency process and regaining control.⁷⁹ A case is often made that if the process of Reverse CIRP is implemented it would allow the backdoor entry of the promoters. There has been plenty of discussion on this aspect and initially, the Supreme Court refused to allow promoters to influence or participate in the resolution process as held in *Chitra Sharma's case*.⁸⁰ The court believed that Section 29A was established to improve corporate governance and public interest, therefore allowing promoters to participate in resolution would undermine the IBC's essential aims. Whereas, in the judgment of *Arcelor Mittal*,⁸¹ the apex court pointed to adopting a more balanced approach in terms of implementing Section 29A. The court instructed the business owner (promoter) to refrain from actively engaging in the CIRP and only function as a lender.⁸² The ruling

⁷⁸ The Insolvency and Bankruptcy Code 2016, §29A, No. 31, Acts of Parliament, 2016 (India).

⁷⁹ *Id.*

⁸⁰ *Supra* note 30.

⁸¹ *Arcelor Mittal India (P) Ltd. v. Satish Kumar Gupta*, (2019) 2 SCC 1.

⁸² *Id.*

acknowledged the business owner's proficiency in decision-making during resolution, which is a deviation from standard procedures when managerial involvement is completely halted.

While the aforementioned implications are majorly based on the ground that the objectives and express mandate of the IBC do not provide for such a Reverse CIRP. It is essential to understand the need for such inclusion owing to economic experimentation. The Supreme Court in the landmark *Swiss Ribbons*⁸³ judgment pointed out the essence of economic experimentation and observed “*Earlier experiments, as we have seen, in terms of legislations having failed, “trial” having led to repeated “errors”, ultimately led to the enactment of the Code*” and “*To stay experimentation in things economic is a grave responsibility, and **denial of the right to experiment is fraught with serious consequences to the nation***”.

The main goal of the IBC is to guarantee the survival and ongoing operation of the Corporate Debtor⁸⁴ and Reverse CIRP should be seen as a strategy for efficiently addressing bankruptcy. While a case can be made against this new method due to its potential to disturb the overall economic equilibrium and its ripple effects, it is crucial to allow for some degree of economic experimentation to meet the evolving requirements of the economy. Moreover, what is essential to understand are the jurisprudential aspects of *balance of convenience* and the *risk of irreparable injury*. The courts while engaging in the discourse of Reverse CIRP always reiterated the risk of irreparable injury to the homebuyers who have invested their life savings.

⁸³ *Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17.

⁸⁴ *Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407.

It is highlighted by the Supreme Court as “*In our view, greater inconvenience is likely to be caused by passing any interim order of constitution of CoC in relation to the corporate debtor as a whole; and **may cause irreparable injury** to the home buyers.*”⁸⁵ The view taken by the courts herein is appreciable but what is essential herein is the legislative exposition and the perimeters for the Reverse CIRP. The clarifications in these regards would be a welcome development and would help in the smooth insolvency resolution process while also aligning with the framework of the law.

VII. INSOLVENCY MECHANISMS: CROSS-JURISDICTIONAL ANALYSIS

An extensive examination of real estate insolvency mechanisms across different jurisdictions is essential for comprehending and resolving difficulties specific to the Indian situation. By analyzing real estate bankruptcy and insolvency frameworks internationally, particularly in nations with strong ecosystems, policymakers and stakeholders in India can obtain guidance to adopt the best practices, effective legislative frameworks, and successful resolution procedures. This framework would enhance investors’ trust, expedite resolution procedures, and eventually improve the condition of the real estate industry.

In the United States of America (USA), the commercial real estate sector made a historic contribution of \$2.3 trillion to the country's GDP and employed 15.1 million individuals in 2022.⁸⁶ It shows the significance

⁸⁵ *Supra* note 65.

⁸⁶Shawn Moura, *Commercial Real Estate Made Record Impact on U.S. Economy in 2022*, NAIOP (2023), <https://www.naiop.org/research-and-publications/magazine/2023/Summer-2023/business-trends/commercial-real-estate-made-record-impact-on-us-economy-in->

of the real estate sector in the USA similar to India's case. Thus, a comparative insolvency laws analysis between India and the USA shall be useful for a closer perspective. It is crucial to comprehend the debtor-friendly stance of the USA. The main approach being followed in the United States Bankruptcy Code has been provided under *Chapter 11* which introduces the "Debtor in Possession" practice.⁸⁷ It means that during the process of restructuring, the existing management, i.e. directors/promoters shall continue to exercise effective control over the finances and assets of the corporate debtor.⁸⁸ It sharply contrasts with India's policy which is based on a creditor-friendly approach in which an IRP takes over the debtor's assets.⁸⁹ Although there is a broad discussion comparing the two systems, India may embrace some portions of the structure of the USA insolvency procedures. The Bankruptcy Code of the USA has the most extensive coverage as it governs the process of liquidation and restructuring for a wide range of commercial entities and also includes several liquidation methods. The Code includes many restructuring plans, including a comprehensive system outlined in *Chapter 11*, as well as tailored programmes for individuals, small enterprises, towns, and family farmers.⁹⁰ Additionally, it includes specific liquidation plans for securities businesses

2022/#:~:text=Commercial%20Real%20Estate%20Made%20Record%20Impact%20on%20U.S.%20Economy%20in%202022,- Summer%202023%20Issue&text=By%3A%20Shawn%20Moura%2C%20Ph.,and%20supported%2015.1%20million%20jobs.

⁸⁷ Anthony Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUMBIA L. J. 1709, 1717, (2020).

⁸⁸ *Id.*

⁸⁹ The Insolvency and Bankruptcy Code 2016, §18, No. 31, Acts of Parliament, 2016 (India).

⁹⁰ *Id.*

and commodities merchants.⁹¹ India's novel method of *Reverse CIRP* is in itself a unique approach and its express integration in IBC by the legislature much akin to the USA would help to resolve ambiguities and if adopted by express amendment the effect would be much akin to USA's structure.

Another interesting approach adopted has been by the United Kingdom (UK). In 2020 UK's Corporate Insolvency and Governance Act came into force and the act envisages a "*rescue culture*" concerning financially indebted corporations.⁹² In essence, the *rescue culture* holds that it is preferable to allow the current management of a corporate debtor to continue running it independently of creditor pressure.⁹³ This allows the management to identify a solution to the business problems through their business acumen and improves the situation for all parties involved. It is pertinent to mention that this new approach adopted by the UK is in line with the newly found concept of Reverse CIRP in India.

However, the approach adopted by France is in contrast with the above nations, as it envisages a creditor-friendly approach post-COVID-19. France's approach can be summed up as, "*The courts have favoured a number of lender-led restructures, enabling lenders to take control of the debtor from its existing*

⁹¹ *Cross-Border Aspects of Insolvency*, BIS, <https://www.bis.org/publ/gten06c.pdf>.

⁹² Jennifer Marshall, *The Corporate Insolvency and Governance Act 2020*, ALLEN AND OVERY (Jan. 02, 2024, 4:45 PM), <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/the-corporate-insolvency-and-governance-bill-the-most-significant-insolvency-reforms-in-the-uk-for-a-generation>.

⁹³ Partha S. Pal et al, *Real Estate Debt and the UK Corporate Insolvency and Governance Act 2020 – The Moratorium*, GREENBERGTRAUIG, (Jan. 04, 2024, 8:55 PM), <https://www.gtlaw.com/en/insights/2021/2/real-estate-debt-uk-corporate-insolvency-and-governance-act-2020-the-moratorium>.

*shareholders.*⁹⁴ Further, one of the methods promoted by the French Insolvency Laws to the creditors is the conciliation privilege,⁹⁵ which now has been made permanent to demonstrate credit friendliness. This is noteworthy that in one of the matters pertaining to the IBC, the Apex Court referred the matter to mediation highlighting the possible inclusion of mediation and conciliation in matters of insolvency.⁹⁶ The goal of IBC is to maximize recovery for all creditors while maintaining the corporate debtor as a continuing concern showing the creditor-friendly stance adopted by India. However, the courts have reflected the need for a balanced approach as has been highlighted above.⁹⁷ A balanced approach also puts India along the same lines as Australia wherein, in 2018 a shift in stance from creditor-friendly to a softer and balanced approach was adopted by the introduction of safe harbor mechanisms and a stay on ipso facto clauses.⁹⁸

The afore-highlighted comparison of India's stance and its approaches under IBC *vis-a-vis* other jurisdictions reveals the path that

⁹⁴ Saam Golshani & Alexis Hojabr, *The Art of the Pre-Pack: France*, GLOBAL RESTRUCTURING REVIEW (March 04, 2022), <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-2/article/france>.

⁹⁵ *Global Restructuring & Insolvency Guide*, BAKERMCKENZIE, <https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2016/12/Global-Restructuring-Insolvency-Guide-New-Logo-France.pdf>.

⁹⁶ ZKN Traders Pvt Ltd v. Kishore Shankar Signapurkar Ltd., (2021) SCC OnLine SC 3160.

⁹⁷ *Supra* note 78.

⁹⁸ Nikhil Khatri, *Debtor-in-possession vs creditor-in-possession insolvency models*, MONDAQ (Feb.02, 2024, 3:22 AM), <https://www.mondaq.com/australia/insolvencybankruptcy/1013138/debtor-in-possession-vs-creditor-in-possession-insolvency-models>.

Indian courts are choosing to take through novel approaches of *Reverse CIRP* and *Project Wise Insolvency* mechanisms and the need for the adoption of a balanced approach amongst the debtors and creditors would put India in a formidable position with its unique approach to effective dispute resolution.

VIII. CONCLUSION AND WAY FORWARD

The enactment of the IBC marked a seminal moment in corporate governance, ushering in an era of profound transformation by supplanting antiquated statutes governing bankruptcy and insolvency.⁹⁹ Through the passage of time and continuous evolution in the past eight years, IBC has evolved to provide effective dispute resolution to the needs of the evolving economy. However, it is pertinent to mention here that the code may benefit from further refinement to better accommodate the nuanced requirements of the real estate industry within its framework. There are numerous instances in India, which account for failed real estate insolvency cases and the ultimate cost-bearer is the homebuyers. It is not the case with India only, the same kind of crisis is being faced by the UK,¹⁰⁰ USA,¹⁰¹ etc. as well. It has been highlighted that while the recognition of their rights was

⁹⁹ Sachin Gupta, *The Journey of Insolvency & Bankruptcy Code*, MONDAQ (Jan.23, 2024, 4:45 AM), <https://www.mondaq.com/advicecentre/content/3750/The-Journey-of-Insolvency-Bankruptcy-Code>.

¹⁰⁰ Irina Anghel *et al.*, *UK Property Slump Causes Surge in Firms in Financial Trouble* BLOOMBERG (Jan.21, 2024, 4: 55 PM), <https://www.bloomberg.com/news/articles/2023-10-31/uk-property-slowdown-causes-surge-in-firms-in-critical-distress?leadSource=verify%20wall>.

¹⁰¹ John Gittlesohn *et al.*, *The commercial real estate crunch is so bad that \$80 billion worth of property is now in distress—a 10-year high*, FORTUNE (Mar. 02, 2024, 3:30 PM), <https://fortune.com/2023/10/18/commercial-property-distress-real-estate-10-year-high/>.

not timely, their complete recognition as secured financial creditors remains uncertain even after 6 years of the 2018 amendment. Pursuing this quandary, the courts have devised *Reverse CIRP* and *Project-Wise Insolvency* as solutions to the problem, with the ultimate goal of preventing “*irreparable injury to the home buyers*”.¹⁰² However, the concepts are not lucid and require more deliberation. The International Insolvency Laws present different mechanisms and India’s new approach may also prove to be path-breaking if executed in a proper manner. It is of considerable interest to examine the cascading effects of the real estate sector within robust ecosystems such as that of the United States. Presently, the USA's real estate sector is distressed and its downward spiral could lead to bankruptcy for up to 385 American banks, mostly small and regional.¹⁰³ Thus, the real estate sector by virtue of being one of the most developing sectors worldwide has the potential of causing deleterious effects to the economy.

The Ministry of Corporate Affairs is proposing various amendments to the code however, they pertain solely to the implementation of project-wise CIRP and they do not address Reverse CIRP and other major challenges of the real estate industry. The concepts are novel and hence effective guidelines by the legislature clearing the air would be much appreciated since these mechanisms are developed by the judiciary. Recently, the IBBI notified key amendments for the real estate insolvency, which includes the direction that allottees’s assets shall not form

¹⁰² *Supra* note 65.

¹⁰³ Laura Bratton, *Commercial real estate woes are a bankruptcy alarm for US regional banks*, QUARTZ (Mar.02, 2024), <https://qz.com/commercial-real-estate-woes-are-a-bankruptcy-alarm-for-1851109651>.

a part of the liquidation estate of the corporate debtor.¹⁰⁴ It can be construed that more primacy should be given to the homebuyers as a secured financial creditor and at the same time a more cautious approach is expected out of lenders for a smooth transition in the processes.¹⁰⁵ The IBC should include enabling clauses that promote Alternative Dispute Resolution procedures as opposed to carrying out a forced sale or liquidation. The Apex Court in one of the instances has even allowed the promoter and the homebuyers to enter into a settlement since the project completion proposal presented by the promoter of the corporate debtor would cater to the interests of the allottees.¹⁰⁶ The adoption of ADR mechanisms at a preliminary stage of insolvency could save the time and efforts of the parties involved and would lead to overall smoother process of corporate reconstruction. Concepts such as Real Estate Investment Trusts (REITs) might perhaps offer a solution to the increasing issue of haircuts¹⁰⁷ due to their consistent and reliable cashflows, they may fulfil the funding needs of incomplete projects. Implementation of a credit rating system for real estate developers, predicated on financial stability and project history, could significantly enhance homebuyer decision-making. Concurrent with this, mandating comprehensive and accurate disclosure of project status, financial health, and associated risks by developers would

¹⁰⁴ Press Release, IBBI, Insolvency and Bankruptcy Board of India amends the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Feb. 13, 2024), <https://ibbi.gov.in/uploads/press/238287e0bf8274f248fb2582e7aa1fac.pdf>.

¹⁰⁵ *Supra* note 65.

¹⁰⁶ Anand Murti v. Soni Infratech Private Limited and Anr, (2022) SCC OnLine SC 519.

¹⁰⁷ Uday Kotak, *IBC How do we reach the promised land?*, Quinquennial of Insolvency and Bankruptcy Code, 2016, 206, 211 (2021), <https://ibbi.gov.in/uploads/whatsnew/1d8b31fc65f7ac6f09a973be8f12f868.pdf>.

foster greater transparency in the overall process. To further aid homebuyers, government-backed online portals could be developed, offering access to verified information about developers and ongoing projects. The role of the judiciary has been magnified many times since they act as '*sentinel on the qui vive*'¹⁰⁸ for the homebuyers. If courts were to instruct the appropriate agencies to give necessary assistance in terms of exchanging information and granting prompt permissions, the resolution process would achieve far better results than what is now observed.

¹⁰⁸ State of Madras v. V.G. Row, AIR 1952 SC 196.