

Discussion Paper on issues related to Real Estate

The Insolvency and Bankruptcy Board of India (IBBI) is committed to maintaining a dynamic and responsive regulatory framework that aligns with evolving market realities and addresses the needs of all stakeholders in the insolvency ecosystem.

This discussion paper draws significantly from the findings and recommendations of a recent study group constituted by the Indian Institute of Insolvency Professionals of ICAI (IIPI), which focused on "Improving Real Estate Resolutions Under IBC and Coordination With RERA."

Furthermore, this paper incorporates issues and concerns raised during recent consultations with resolution applicants, Insolvency Professionals, and other key stakeholders in the insolvency resolution process. By addressing these practical challenges and proposing targeted amendments, we aim to enhance the efficiency and effectiveness of real estate insolvency proceedings under the IBC.

The proposals outlined in this discussion paper cover a range of critical areas, including:

1. Proposed Inclusion of Land Authorities in Committee of Creditors (CoC) Meetings
2. Handling Cancelled Land Allotments in Real Estate Insolvency Cases
3. Empower CoC to Facilitate Participation of Associations of Allottees as Resolution Applicants
4. Clarification about inclusion of Interest in Homebuyers' Claims in CIRP
5. Representation of large numbers of creditors through facilitators
6. Proposal to disseminate Committee of Creditors (CoC) minutes of the meeting to all creditors in class of real estate projects
7. Streamlining Possession Handover in Real Estate Projects

We invite all stakeholders to review these proposals and provide their valuable feedback.

1. Proposed Inclusion of Land Authorities in Committee of Creditors (CoC) Meetings

1.1 Issue: In corporate insolvency resolution processes (CIRP) involving real estate companies, land authorities play a crucial role but currently lack mandatory representation in the Committee of Creditors (CoC). At present, financial creditors are included in the CoC, while land authorities, generally being operational creditors, are not. This absence may lead to insufficient consideration of land authorities' perspectives on land-related issues and regulatory requirements, potentially causing delays or complications in implementing resolution plans due to unforeseen challenges. Moreover, valuable input from land authorities that could enhance the viability and feasibility of resolution plans is often missed, reducing coordination between the insolvency proceedings and land-related matters.

1.2 Given the significance of land assets and associated regulatory compliance in real estate projects, there is a clear need to ensure that land authorities have a formal channel to provide input during the CIRP, while maintaining the decision-making authority of financial creditors. The report of study group constituted by IIIPI also advocated for suitable representation of land authorities in Committee of Creditors.

1.3 Proposal: The proposed amendments would mandate the inclusion of competent authorities as invitees to CoC meetings in cases involving real estate companies, without voting rights. This would be achieved by adding a new sub-regulation to Regulation 18 requiring the resolution professional to invite as "*Competent Authority*" as defined in Real Estate Regulation Act, 2016 to attend CoC meetings as special invitees without voting rights. By providing competent authorities including the land-owning authorities with the opportunity to offer input and raise concerns during the CIRP, while preserving the decision-making authority of the CoC, the proposed changes address a significant issue in the regulatory framework. From a stakeholder perspective, the presence of such competent authorities in CoC meetings can enhance transparency and build confidence among homebuyers and other stakeholders in the resolution process.

2. Handling Cancelled Land Allotments in Real Estate Insolvency Cases

2.1 Issue: The IIIPI report noted issues related to cancellation of land lease or allotment, in cases involving real estate corporate debtors (CDs). In this regard, there have been instances where the allotment of land has been cancelled and possession has been taken back by the authorities before the insolvency commencement date (ICD). This situation creates uncertainty in the CIRP as the primary asset of the CD may no longer be available. Currently, there is no specific provision in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 to address this issue.

2.2 Proposal: It is proposed to amend the IBBI (Insolvency Resolution Process for

Corporate Persons) Regulations, 2016 to include a provision requiring the Insolvency Professional (IP) to report to the CoC and Adjudicating Authority when land allotment has been cancelled and possession taken back by authorities before the Insolvency Commencement Date (ICD) in real estate insolvency cases. This crucial information will enable the CoC to make an informed decision on alternatives such as withdrawal, early liquidation/dissolution, or continuance of CIRP.

2.3 The proposed amendment aligns with the spirit of Regulation 40D of CIRP regulations, which outlines factors for the committee to consider when contemplating liquidation of the corporatedebtor. These factors include non-operational status, obsolescence of goods or services, absence of assets, lack of intangible assets, and other elements that may affect the entity's value as a going concern. By ensuring timely reporting of land allotment cancellations, the CoC will be better equipped to assess the viability of the real estate project and make decisions that best serve the interests of all stakeholders involved in the insolvency process.

3. Empower CoC to Facilitate Participation of Associations of Allottees as Resolution Applicants

3.1 Issue: The Code aims to facilitate timely resolution of corporate insolvency while maximizing asset value. In real estate insolvencies, allottees constitute a significant stakeholder group as financial creditors. The current regulatory framework allows associations of allottees to participate in the CIRP as resolution applicants. While these requirements are designed to ensure serious participation, they may inadvertently exclude genuine stakeholder groups like allottee associations from the resolution process, particularly in real estate insolvencies where allottees have the most direct interest in project completion. However, as highlighted by the report of the IIIPI study group, there are some ambiguities regarding powers of CoC to relax eligibility criteria(s), earnest money deposit requirements, and performance security obligations in case of these associations.

3.2 Proposal: To address these challenges, it is proposed to clarify by way of explanation that the Committee of Creditors (CoC) is empowered with the discretion to relax certain conditions for qualified associations or group of allottees to participate as resolution applicants in the CIRP. The proposal aims to amend the CIRP regulations to expressly provide that the CoC may approve relaxations to the eligibility criteria, earnest money deposit, and performance security requirements for allottee associations or groups that represent at least 10% of allottees or 100 allottees, whichever is higher.

4. Clarification about inclusion of Interest in Homebuyers' Claims in CIRP

4.1 Issue: The Insolvency and Bankruptcy Code, 2016 (Code) recognizes homebuyers as financial creditors, granting them a significant role in the Corporate Insolvency Resolution

Process (CIRP). However, an issue exists in the treatment of notional interest for homebuyers' claims. While Regulation 16A(7) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for calculating voting share based on financial debt with an 8% per annum interest rate. This 8% rate of interest matches the opportunity cost of the money disbursed. This opportunity cost could be the interest rate on a fixed deposit (a safer alternative to real estate) or on a home loan, typically between 7% and 11%. Thus, the average rate of 8% specified in regulation 16A(7) is seen as fair for calculating the allottee's claim amount.

4.2 However, in practice, there are inconsistencies: while many insolvency professionals use this 8% rate for claim calculations, some apply it only to determine voting shares and not for the actual claim. IIIPI report noted that this situation frequently leads homebuyers to seek orders from other forums such as RERA or Consumer Forums, where the orders would include amount of such interest. The IIIPI study group report notes that this leads to increased litigation. Thus, there is a need for clarity in this regard.

4.3 Proposal: It is proposed to clarify that the provision of interest at 8% per annum should also be considered as part of the claim for the purpose of resolution plans and distributions under Section 53 of the Code.

4.4 This proposed amendment would create consistency by aligning the calculation of voting rights with the valuation of claims, resulting in a more coherent framework within the insolvency process. It could potentially reduce litigation by providing for interest within the insolvency framework, thereby reducing the need for homebuyers to seek orders from other forums.

5. Representation of large numbers of creditors through facilitators

5.1 Issue: The current provisions in the Insolvency and Bankruptcy Code (IBC) and Corporate Insolvency Resolution Process (CIRP) regulations allow for only one Authorised representative (AR) per class of creditors, regardless of the class size. In cases where a class has a very large number of creditors, a single AR may face challenges in effectively representing and communicating with all creditors. This can potentially lead to inadequate representation of diverse interests within the class and communication bottlenecks.

5.2 Proposal: To address this issue, we propose allowing the appointment of facilitators for large classes of creditors, primarily to improve communication and representation.

6. Proposal to disseminate Committee of Creditors (CoC) minutes of the meeting to all creditors in class of real estate projects

6.1 Issue: The minutes of meeting in a real estate project undergoing insolvency, contains discussions and decisions about the project status updates, financial decision affecting project, timelines for project completion, issues or challenges faced in resolution process,

any application filed before Tribunal/Court by stakeholder, voting outcomes on critical decisions, CIRP cost etc.

6.2 Regulation 25(5)(a) of the CIRP Regulations require the RP to circulate the minutes of the meeting to all participants by electronic means within forty-eight hours of the said meeting. The Authorised representative (AR) is required to share the minutes of the CoC meeting to the financial creditors it represents as per Section 25A(2) of the Code. Regulation 16A(10) of the CIRP Regulations provides for the Authorised representative to review of the minutes of the meeting prepared by the RP and facilitate the allottees to have access to any information or documents required to form an opinion on issues discussed in the committee meetings.

6.3 In the normal CIRP cases, since creditors are represented in the CoC have access to discussion and minutes of meeting. In case of real estate cases, the homebuyers who are financial creditors are represented by the AR. The AR should brief the homebuyers about the discussions in the CoC. However, there are cases where there is lack of communication between AR and homebuyers.

6.4 Proposal: It is felt that the access to minutes of meeting of CoC in real estate insolvency cases to the allottees of real estate project will ensure them to stay informed about project developments, act as single authoritative source of information, provide valuable input and feedback. This will in turn enhance transparency and counter rumours and misinformation.

6.5 The proposal is to facilitate the RP to place the minutes of the CoC meeting on the website where all the CIRP related information is published/uploaded by the RP. The minutes shall be provided through secured login system to the allottees.

7. Streamlining Possession Handover in Real Estate Projects

7.1 Issue: The IIIPI Report on real estate has emphasized the need to implement possession handover proposals from the Discussion Paper dated November 6, 2023 for providing necessary clarity. In the context of CIRP, Insolvency Resolution Professionals face the critical task of ensuring business continuity, including the management of inventory. The real estate sector presents a unique challenge where, in many cases, creditors have fulfilled their contractual obligations and the corporate debtor has completed unit construction, yet the formal handover remains pending.

7.2 Currently, courts have exercised their inherent powers to permit ownership transfer and registration during CIRP in select projects. Hon'ble NCLAT in Company Appeal (AT)(Insolvency) No 350 of 2020 in the matter of *Alok Sharma & Ors. Vs. M/s. I.P. Constructions Pvt. Ltd.* observed that "*CD is the owner of the 'Commercial Space' and has accepted that the possession was with the Appellants admittedly. The Appellants are allottees of commercial space in 'Coral Brio'. Although the CD had handed over the possession of Commercial space to the Appellants, admittedly, no sale deed was executed by the CD in favour of allottees prior to the commencement of CIRP. The houses so*

constructed is the business of the real estate company and the value of sale of those houses will always appear in the credit side of the profit and loss accounts as “Revenue from operations”. Hence, this is not an asset, in case of real estate company as it is recurrent business activity for the company & it is its business for continuation of its operation as a going concern even during CIRP. We are unable to sustain the views of Respondent/RP that these houses registration will violate ‘Moratorium’ under Section 14 of the Code. The Registration of all these houses is the ‘procedural requirements’, in case of ‘Real Estate Company’ where the Appellants are already in possession of these spaces. The rights of home buyers cannot be affected adversely in the ‘Corporate Insolvency Resolution Process’ and their interest is to be appropriately preserved and protected within the parameters of the I & B Code, 2016.”

7.3 Further, the Hon’ble Supreme Court in the CIRP of Hacienda Projects Private Limited in *New Okhla Industrial Development Authority (NOIDA) Vs. Lotus 300 Apartment Owners Association & Ors.* vide order dated 27th September, 2024 stated that: “....*The petitioner, NOIDA, must adopt a positive and proactive approach to ensure that the flat owners/buyers are given possession of their flats and that the registered deeds are executed.*

The Chief Executive Officer of NOIDA shall appoint a Nodal Officer, to ensure that there is compliance with this order. The Nodal Officer will interact with the Lotus 300 Apartment Owners Association as well as the Resolution Professional of the builder company, which is now under Corporate Insolvency Resolution Process....

The Resolution Professional shall sign the documents on behalf of the builder-company/developer. The list of the flat buyers/owners, flat numbers along with the area, will be also given by the Resolution Professional.”

7.4 In a real estate case, the immovable property is the inventory of the real estate business which needs to be sold in order to run it as a going concern and the accrual of such revenue is provided in the Profit & Loss Account. So, dealing with the same for running the CD as a going concern is not a violation of the moratorium. For the reason that insolvency professional while doing so, may impinge on the rights of other creditors, a requirement of approval of CoC has been kept for balancing the rights.

7.5 Thus, there is strong case for allowing transfer of immovable property in appropriate cases if the concerned stakeholders i.e., creditors have approved the same. Thus, where the allottees have paid the full amount and occupied the units or possession of a plot, apartment, or building, the transactions need to be formalized through the transfer of such units during the resolution process with the approval of the CoC. Further, units which are under technical possession of allottees should not be included in the IBC process by the RP. The objective in the resolution of the real-estate project is a smooth handover of units to the rightful homebuyers. Thus, to expedite the resolution process and avoid delays due to unnecessary holds-ups, the allottees can be given the option to take possession of the units on ‘as is where is’ basis or on payment of the balance amount, if any, after taking in

to account the funds due and funds required for completing the unit after approval of CoC. Once units are handed over, registration/ sublease should be done.

7.6 Proposal: To facilitate the smooth handover of occupied units or where possession has been transferred to home buyers, it is proposed to allow RP to handover the ownership of a plot, apartment, or building to the allottees through transfer during the resolution process, with the approval of CoC. Further, to avoid delays due to unnecessary holds-ups, it is also proposed that with the approval of the CoC, RP may also be permitted to hand over the possession of units to the allottees on ‘as is where is’ basis or on payment of balance amount, if any, after taking in to account the funds due and funds required for completing the unit.

8. Public comments

The Board accordingly solicits comments on the proposal discussed above and the draft regulations placed in the **Annexure**. After considering the comments, the Board proposes to make regulations under clauses (aa) and (t) of subsection (1) of section 196 of the Code.

9. Submission of comments

Comments may be submitted electronically by 27th November, 2024. For providing comments, please follow the process as under:

- i. Visit IBBI website, www.ibbi.gov.in;
- ii. Select ‘Public Comments’;
- iii. Select ‘Discussion paper – Discussion Paper on Issues related to Real Estate’
- iv. Provide your Name, and Email id;
- v. Select the stakeholder category, namely, - a) Corporate Debtor; b) Personal Guarantor to a Corporate Debtor; c) Proprietorship firms; d) Partnership firms; e) Creditor to a Corporate Debtor; f) Insolvency Professional; g) Insolvency Professional Agency; h) Insolvency Professional Entity; i) Academics; j) Investor; or k) Others.
- vi. Select the kind of comments you wish to make, namely, a) General Comments; or b) Specific Comments.
- vii. If you have selected ‘General Comments’, please select one of the following options:
 - a. Inconsistency, if any, between the provisions within the regulations (intra regulations);
 - b. Inconsistency, if any, between the provisions in different regulations (inter regulations);
 - c. Inconsistency, if any, between the provisions in the regulations with those in the rules;
 - d. Inconsistency, if any, between the provisions in the regulations with those in the Code;

- e. Inconsistency, if any, between the provisions in the regulations with those in any other law;
- f. Any difficulty in implementation of any of the provisions in the regulations;
- g. Any provision that should have been provided in the regulations, but has not been provided; or
- h. Any provision that has been provided in the regulations but should not have been provided.

viii. And then write comments under the selected option.

9.1. If you have selected 'Specific Comments', please select para number and write comments under the selected para number.

9.2. You can make comments on more than one para, by clicking on more comments and repeating the process outlined above from point 9.6 (vi) onwards.

9.3. Click 'Submit' if you have no more comments to make.

**GAZETTE OF INDIA
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NEW DELHI, xxxxDAY, xxxx xx, 2024**

**INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
NOTIFICATION
New Delhi, the _____, 2024**

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2024.

No. IBBI/2024-25/GN/REGxxx.— In exercise of the powers conferred by clause (t) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations to further amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, namely: -

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2024.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, (hereinafter referred to as ‘the principal regulations’) after regulation 3C, the following sub-regulations shall be inserted, namely:

(3D) Where the number of creditors in a class referred to in this regulation exceeds one thousand in the aggregate, the committee may, direct the interim resolution professional or resolution professional, as the case may be, to appoint or replace an insolvency professional(s) other than interim resolution professional, resolution professional and authorised representative as facilitator(s) for sub-groups within the class, subject to the following conditions:

(a) the appointment of facilitators shall be considered only if, after the first meeting of the committee, at least 10% of the creditors in the class or hundred creditors, whichever is lower, request the inclusion of an agenda item for such appointment.

(b) categorisation of creditors into sub-groups for the purpose of their assignment to respective facilitators.

(c) the total number of facilitators shall not exceed five.

(d) the fees for facilitators shall be 20% of the fees specified for the authorised

representative and such fees for facilitator shall be part of insolvency resolution process cost.

(3E) The roles and responsibilities of the facilitators shall include:

- (a) facilitating communication between the authorised representative and the creditors assigned to him.*
- (b) attend the meetings of the committee, as observers, to facilitate communication between creditors allotted to them and the committee.*
- (c) providing information and clarifications to the creditors about the insolvency resolution process, as per advice of the authorised representative.*
- (d) any other tasks assigned by the committee to improve representation and communication.*

3. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, (hereinafter referred to as ‘the principal regulations’) after regulation 4D, the following sub-regulation shall be inserted, namely:

4E. Handing over the possession.

After obtaining the approval of the committee with not less than sixty-six percent of total votes, the resolution professional, shall:

- (1) hand over the possession of the plot, apartment, or building or any instruments agreed to be transferred under the real estate project where the allottee has performed his part under the agreement, and facilitate registration; or*
- (2) provide an option to the allottees to acquire such units or on payment of balance required to complete the unit during the process.*

Explanation I. – for the purposes of handing over the possession, the allottees are required to pay all applicable charges or do all the compliances as per the terms of the sale deed or allotment letter or any instrument for transfer and possession of the sale deed which shall not be inconsistent with the applicable laws.

Explanation II. – where the units are under possession of the allottees, it shall not be part of the assets of the corporate debtor.

4. In Regulation 8A of the principal regulations, after sub-regulation (3), the following sub-regulation shall be substituted, namely:

- (4) The interest calculated at the rate of eight per cent per annum for the purpose of determining the voting share of a creditor in a class under sub-regulation 16A(7) shall also be included in the claim amount of such creditor unless a different arrangement has been agreed between parties.*

5. In Regulation 18 of the principal regulations, after sub-regulation (4), the following sub-regulation shall be inserted, namely:

(5) Where the corporate debtor has any real estate project, 'competent authority' as defined in section 2(p) of The Real Estate (Regulation and Development) Act, 2016, related to such project shall be invited to attend the meeting of committee of creditors without voting rights, for providing inputs on matters associated with development of such project.

6. In the principal regulations after regulation 25(5)(a), the following proviso shall be inserted:

Provided that where the corporate debtor has any real estate project, the minutes of the meetings of the creditors shall also be made accessible to all creditors in a class through a secured login system.

7. In the principal regulations after regulation 30B, the following regulation shall be inserted, namely:

30C. Report on status of development rights and permissions of real estate projects

(1) Where the corporate debtor has any real estate project, the resolution professional shall:

- (a) prepare a report detailing the status of development rights and permissions required for development of such project;
- (b) submit the report to the committee of creditors for consideration for its comments; and submit the report referred to in clause (1)(a) to the Adjudicating Authority along with the opinion of Committee in this regard, on or before the sixtieth day from the insolvency commencement date.

8. In the principal regulation, the following clause (ac) shall be inserted, after clause (ab) of sub-regulation (a) of Regulation 31 as under:

(ac) fee payable to facilitator under [sub-regulation (3D)] of regulation 16A.

9. In the principal regulations, the following explanation shall be inserted, in sub-regulation (4) of Regulation 36A namely:

Explanation.- Where the corporate debtor has any real estate project, the committee of creditors may relax for an association or group of allottees representing minimum of 10% of allottees of that project or hundred, whichever is lower in respect of:

- (a) eligibility criteria for submission of expression of interest; and*
- (b) earnest money deposit requirements.*

10. In the principal regulations, the following explanation shall be inserted, in sub-regulation (4A) of Regulation 36B namely:

Explanation III.- Where the corporate debtor is a real estate company, the committee

of creditors may relax the requirement to provide for performance security for an association or group of allottees representing minimum of 10% of allottees of that project or hundred, whichever is lower.

Mr. Ravi Mital, Chairperson

[ADVT.- _____]

Note: The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 were published vide notification No. IBBI/2016-17/GN/REG004, dated 30th November, 2016 in the Gazette of India, Extraordinary, Part III, Section 4, No. 432 on 30th November, 2016 and were last amended by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2024 published *vide* notification No. IBBI/2023-24/GN/REG113, dated the 15th February, 2024 in the Gazette of India, Extraordinary, Part III, Section 4, No. 284 on 15th February, 2024.
