

**GNLU CENTRE FOR LAW & ECONOMICS**  
**Policy Recommendations**



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**Comments to the Insolvency and Bankruptcy Board of India on the  
Discussion Paper on Issues related to Real Estate**

Comments on behalf of the Policy Inputs Research Group on IBBI, GNLU  
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### **I. Introduction**

The Insolvency and Bankruptcy Board of India (“IBBI”) has issued a discussion paper regarding proposed amendments to Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, particularly focused on improving regulations concerning real estate resolutions under the Insolvency and Bankruptcy Code, 2016. The paper addresses issues and concerns raised during recent consultations with resolution applicants, insolvency professionals, and other key stakeholders involved in the insolvency resolution process. By tackling these practical challenges and proposing targeted amendments, the aim is to enhance the efficiency and effectiveness of real estate insolvency proceedings under the Insolvency and Bankruptcy Code (IBC).

Aligned with the mission of the Centre for Law and Economics at Gujarat National Law University, a dedicated Research Group has been assembled to thoroughly examine these proposals. This group aims to provide constructive recommendations that balance regulatory objectives with the operational realities of the insolvency resolution process.

This document presents our detailed comments, aiming to strike a balance between regulatory oversight, transparency, and operational flexibility. The Research Group has conducted an in-depth analysis of the proposed amendments and offers suggestions to enhance the regulatory framework’s effectiveness.

## II. Specific Comments

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

#### Issue in brief:

Land authorities play a crucial role in corporate insolvency resolution processes (CIRP) involving real estate companies and land related issues. However, they do not have mandatory representation in the meeting of the Committee of Creditors (CoCs) as CoC presently includes financial creditors, while the land authorities are operational creditors. This underrepresentation of the views of land authorities on land-related issues and regulation can lead to delays and challenges in the implementation of resolution plans on account of unforeseen complications.

The inclusion of land authorities will facilitate the input of valuable insights and add to the practicality of resolution plans. This will further enhance the alignment between insolvency proceedings and matters involving land and its regulation.

Considering the importance of land as an asset and the regulations real estate projects are subjected to, a robust and comprehensive mechanism for experts and officials from land authorities to give their insights during the CIRPs to better handle such issues is the need of the hour. Moreover, the proposed inclusion of land authorities as non-voting members would maintain the decision-making powers of the financial creditors.

Summary of Proposal: The proposal suggests inclusion of land authorities as non-voting members in CoC meetings during CIRPs. This would be done by amending Regulation 18. The mandatory involvement of land authorities, operational creditors, allows them to give their valuable insights in CoC meetings which enhances the feasibility and overall outcome of the resolution plan while also maintaining the decision-making authority of financial creditors.

#### Comments:

Yes, the land authorities such as the Real Estate Regulatory Authority (RERA) should be included in the real estate CIRPs as non-voting members, in the capacity of them being the authority with jurisdiction over land-related issues as well as operational creditors. Thus, the proposed addition of a new sub-regulation to Regulation 18 is a welcome step which will facilitate comprehensive and robust resolution of CIRPs.

#### Rationale:

The proposed involvement of land authorities in the CoC meetings during CIRPs solves two economic problems.

Firstly, it significantly addresses the information asymmetry in insolvency proceedings related to land and its regulation. Financial creditors might not have the critical insights into land regulatory mechanisms and similar problems which might come in the course of implementation of the resolution plans. This will make the allocation of resources efficient and ultimately benefit all the stakeholders.

Besides, the inclusion of land authorities would substantially decrease the negative externalities often encountered in insolvency proceedings of real estate projects which will have positive impact on homebuyers, local economies, and regulatory bodies. Problems such as project delays and land use violations can be dealt with beforehand, reducing negative spillovers.

The inclusion of land authorities in CoC meetings can be viewed in two ways.

In the capacity of authorities having jurisdiction over land and the responsibility of its regulation, they have crucial insights regarding regulatory requirements and compliance issues which can create problems during the on-ground implementation of the resolution plans. The involvement of land authorities would ensure adequate consideration of these factors and would prevent delays and future complications, thus enhancing the effectiveness of the insolvency proceedings.

Land authorities, with their involvement, would be able to provide timely updates on changes in the status of land or compliance requirements. This will make the necessary and circumstantial adjustment in resolution plans quicker and robust.

The presence of land authorities signifies more transparency in framing and implementation of decisions arrived at during insolvency proceedings. This will bolster the confidence of people in the code overall.

Another way to look at it is that land authorities, as operational creditors, have no representation in the insolvency proceedings which only involves financial creditors. These authorities, being stakeholders and having vested interest in successful resolution of land-related insolvency issues, should have necessary representation in the CoC meetings. The interest of financial creditors and operational creditors should be balanced appropriately with the aim of increasing the overall effectiveness and practicality of the bankruptcy code presenting equitable resolution outcomes. This will make the resolution plan not only financially, but also operationally viable. This significantly reduces the possibility of derailment of recovery plans such as compliance issues.

They are well-positioned to address specific challenges related to land allotments and cancellations. Their inclusion allows for better plans with robust strategies while also maintaining the decision-making authority of financial creditors. Moreover, their non-voting status preserves the decision-making role of the financial creditors.

## **2. Handling Cancelled Land Allotments in Real Estate Insolvency Cases**

### Issue in brief:

Sometimes in CIRP proceedings involving real estate corporate debtors (CDs) the allotment gets cancelled before the Insolvency Commencement Date (ICD). The project property is then taken back by the authorities. This creates a problem as the primary asset is no longer available.

### Summary of Proposal:

An amendment of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has been proposed. The amended regulation would 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 ICD in real estate insolvency cases. It is believed that this crucial information would allow the CoC to recalibrate its approach.

### Comments:

The above proposal is well intended. It would save valuable time and allow the CoC to decide the best course of action. However, the problem arises with the way it might get incorporated into the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Instead of a separate provision it is recommended that it may be incorporated by way of explanation appended to Regulation 36 of the aforementioned regulations.

### Rationale:

The Rationale behind the above suggestion is the content of Regulation 36 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The regulation provides for Information Memorandum (IM) to be presented to the CoC by the 95th day from the Insolvency Commencement Date (ICD). The IM is supposed to include information regarding inter alia the assets and liability of the company. Further, this regulation needs to be read in light of the explanation provided under sub-section 2 of section 29 of the Code. Wherein it is explained that the IM must contain all the “relevant information” which may be required by the Resolution Applicant to prepare a Resolution Plan for the Corporate Debtor. In the case discussed above, it is necessary for such information to be disclosed for the smooth conduction of the CIRP process. Therefore, it should ideally be part of IM only.

Furthermore, IM provides a systematic way to disclose the information and is subject to several regulations. While preparing an IM, the RP is required to follow certain timelines stipulated under the CIRP Regulations and further comply with other provisions of the Code to ensure that the information of the Corporate Debtor, which may contain important business records, cannot be misused by the competitors.

In short, the required disclosure must be through IM as there are already well defined timelines and regulations which would need to be recreated if a separate provision is introduced.

#### Additional Comments:

The document carries additional proposals for the improvement of the CIRP process involving Real estate. It suggests inclusion of Regulation 30 C into the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The said regulation provides for submission of a report detailing the status of development rights and permissions required for development of the project. The duty has been entrusted upon the RP. It is however recommended that a special class of professionals be entrusted with the work. It would be better if a consultancy firm is employed to not only provide the legal round up, but also economic feasibility of the project.

#### Rationale:

Firstly, the IP are not trained in this aspect. Development rights and permissions require specific practical and legal knowledge. While the Limited Insolvency Examination covers legal topics, there is nothing to suggest it translates to understanding of local building laws. Furthermore, it would be necessary to determine the viability of the project to also explore its economic feasibility. Such work would require help from consultancy firms with prior experience in the field. IBBI should bring in Regulations to regulate these firms akin to the Companies (Registered Valuers and Valuation) Rules, 2017.

From an economic perspective, the following position emerges:

**Monetary Cost:** While the exact data is not available from India. But price quotes from U.S based companies show that prices range anywhere from \$15,000 to \$20,000 for medium size projects. India's PPP is 3-4 times lower than that of USA. Furthermore, the labour prices which form a big part of the spending in consultancy costs around 40%-60% less in India. Adjusting them for PPP and currency difference translates to ₹8.3 Lakh in India. Considering that the minimum required amount for a CIRP process is ₹1 crore, a price of ₹ 8.3 Lakh is just a drop in the ocean.

**Time cost:** A consultancy report may take from a few weeks to a few months to come through. This might be an issue with the short and strict timeline in the CIRP process. However, the wait is worth the investment. Such decisions involve massive capital investment and should not be rushed.

**Enhanced Recovery:** A professional can ensure the project is carried out efficiently. This will ensure that the project has the maximum possible recovery.

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

### Issue in brief:

In real estate insolvencies, allottees, as financial creditors, hold significant stakes in ensuring the completion of stalled projects. However, the current regulatory framework, while aimed at ensuring serious participation may exclude genuine allottee associations. Ambiguities persist regarding the powers of the CoC to relax conditions, limiting the ability of allottee associations to effectively participate as resolution applicants in the CIRP.

### Summary of Proposal:

An amendment to the CIRP regulations to explicitly empower the CoC to relax eligibility criteria, Earnest Money Deposit, and performance security requirements for associations or groups of allottees. These relaxations would apply to associations that represent at least 10% of allottees or 100 allottees, whichever is higher.

### Comments:

The proposal deals with the requirements for flexibility and clarity in permitting associations of allottees to apply as resolution applicants. With these relaxations to promote their participation, the procedure concurs with the principles of stakeholder value maximization in the CIRP. However, it is essential to ensure adequate safeguards like proper verification of documents and maintaining a list of allottees for CoC to prevent misuse and ensure only credible stakeholders benefit from the abovementioned relaxations.

### Rationale:

The proposal helps in addressing the dynamics of real estate insolvencies and the crucial role that allottees play as financial creditors. These stakeholders must actively participate in the CIRP since they have a direct and vested interest in seeing stalled projects through to completion.

The existing regulatory requirements, such as stringent eligibility criteria, EMD, and performance security obligations, often act as barriers for genuine allottees to participate in the process. Such measures recognize the unique position of allottees as directly impacted stakeholders, facilitating their meaningful participation in resolutions.

It also improves the CoC's capacity to make judgments that are tailored to the particular context of real estate developments. This approach achieves a balance between process integrity and stakeholder empowerment by offering such freedom while preserving safeguards against abuse, which eventually leads to more effective and efficient responses. Especially when it comes to real estate insolvencies, this helps the IBC achieve its goals of prompt and effective settlement.

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

##### Issue in brief:

There are inconsistencies in the rate of interest calculated for the claim of homebuyers. Regulation 16A (7) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides an 8 % per annum interest rate on the financial debt of the creditor when calculating the voting share of a creditor. However, while this rate is applied for calculating the voting share, often, the same rate is not applied when calculating the claim amount. This has resulted in the allottee homebuyers approaching consumer forums or Real Estate Regulatory Authority for orders to determine the rate of interest for the claim, leading to multiple litigations.

##### Summary of Proposal:

It is proposed that the 8 % per annum interest rate be ascribed to the claim amount as well for the purpose of resolution plans and distribution, unless agreed upon by the parties differently. To do this, it is proposed that Regulation 8A (4) be added to the IBBI (IRPCP) Regulations reflecting the same.

##### Comments:

It is a settled position that homebuyers are financial creditors. Thus, the 8% interest rate provision applies when calculating their voting shares, similar was held by the NCLT in *M/s Dhankalash Distributors Pvt. Ltd Vs. Arena Superstructures Pvt. Ltd.* (2022). However, unlike other financial creditors, homebuyers have access to other forums such as the RERA Authority and consumer forums, where they can submit their claims, before the institution of CIRP.

The 8% interest rate might not be appropriate for the homebuyers. It should also accommodate the default interest rate prescribed as per the respective RERA Rules where the project or the registered office of the corporate debtor is located.

##### Rationale:

While homebuyers are financial creditors, it is well discussed that their position as a creditor is different than other financial creditors due to the nature of their interest. Homebuyers or allottees, when purchasing the property, expect a property in return and not merely financial compensation. The Real Estate (Regulation and Development) Act, 2016 was enacted to protect the interest of allottees of a real estate project and it prescribes the compensation payable to allottees.

Section 18 of RERA prescribes that where the promoter fails to complete the project or provide possession, the allottee is entitled to receive: i. refund of the amount he has tendered along with



interest rate as prescribed, where the allottee withdraws from the project; or ii. where an allottee intends to continue with the project even after the default, the allottee is entitled to interest rate as prescribed under rules until possession is handed over.

Gujarat and Maharashtra RERA Rules prescribe the default interest rate of Marginal Cost of Lending Rate – State Bank of India Prime Lending Rate plus 2 % which is currently at about 9.00%, so it would total 11%. When this default rate is prescribed under RERA, prescribing 8% with only qualification being a contract between the parties would hurt the entitlement of allottees. It would also not reduce the issue of allottees approaching the authority under RERA for favorable orders ascribing higher interest rates.

This proposal might curb a lower interest rate being included in the claim of the homebuyers and thus, it is not a bad proposal per se. It would also ensure 8% interest rate to the allottees. But for there is need for harmonizing RERA and IBC for better dealing with the claims of the homebuyers so that there aren't two parallel and inconsistent laws governing their rights.

Thus, in proposed Regulation 4A, an explanation should be added that, where the financial creditors are homebuyers, the default rate as per RERA should be included in the claim, even if there has not been any arrangement between parties with regard to it.

## **5. Representation of large numbers of creditors through facilitators**

### Issue in brief:

As it is defined in the IBC and CIRP regulations, through each class of creditors there shall be one Authorised Representative (AR) irrespective of how many are there in the class. In the cases, where the class has too many creditors, it may be very difficult for a single AR to represent the interests of all sections. These challenges include the inability to comprehend and reconcile different views in the class, problems of equitable participation and problems of effective and timely communication with big numbers of the group. This can result in misrepresentation, communication clutter, and decrease in overall effectiveness of the resolution process.

### Summary of Proposal:

In order to help the AR in their responsibilities, it is suggested that facilitators be introduced for large creditor classes. By serving as intermediaries, these facilitators would help the AR and the individual creditors communicate more efficiently. They would make sure that the AR is informed of creditors' concerns, questions, and preferences in a methodical and effective way. Facilitators would improve overall transparency, participation, and fairness in the insolvency resolution process by helping the AR better represent the various interests within the class through logistical and operational support.

### Comments:

One way to address the shortcomings of the current system is to propose the introduction of facilitators for large creditor classes. Facilitators can improve communication, lessen the administrative burden on the AR, and guarantee that a range of interests are adequately represented. To clarify their role, uphold accountability, and avoid disputes with the AR, clear guidelines are necessary. This proposal has the potential to significantly improve the insolvency resolution process's inclusivity and efficiency with the right safeguards in place.

### Rationale:

In order to ensure the successful implementation of the proposal 5 - “Representation of large numbers of creditors through facilitators”, the comment addresses potential concerns while acknowledging the proposal's practical value in introducing facilitators. It recognises that managing communication, capturing a variety of interests, and fairly representing all stakeholders are some of the major challenges that large creditor classes present for a single AR. These difficulties can be lessened by bringing in facilitators, who can serve as go-betweens to improve communication, help get feedback from creditors, and help the AR carry out their duties effectively.

However, safeguards must be taken to guarantee that facilitators enhance the resolution process rather than make it more difficult. To prevent duplication of effort or possible conflicts with the AR, for instance, explicit guidelines must specify the extent of their role. Furthermore, accountability systems are necessary to guarantee that facilitators act impartially and uphold the interests of all creditors, not just one specific subgroup.

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

### Issue in brief:

The minutes of meetings in real estate insolvency cases serve as important documents that record discussions and decisions about the project's status, financial matters, timelines, and challenges faced. All Committee of Creditors (CoC) must receive these minutes within 48 hours. In typical insolvency cases, creditors access meeting minutes directly while homebuyers in real estate cases depend on their Authorised Representative (AR) to provide information. There are concerns about potential communication gaps that homebuyers and ARs may face.

### Summary of Proposal:

To improve transparency and reduce misinformation in real estate insolvency cases, it is proposed that the Resolution Professional (RP) should upload the minutes of CoC meetings to a secure website and keep them accessible for all stakeholders. This will allow homebuyers (allottees) to access the latest information about the project's progress.

#### Comments:

Distributing the minutes from the CoC meetings will improve transparency and accessibility, and will empower homebuyers by giving them a greater understanding of the process. To effectively assist homebuyers, the minutes of the meeting should be available and the Authorised Representative (AR) should conduct a meeting with the homebuyers to explain the CoC meeting minutes and provide any necessary context. This aligns with Regulation 16A (10) (a) of the IBBI CIRP Regulations, 2016, which mandates that the AR should “assist the creditors in a class he represents in understanding the discussions and considerations of the committee meetings and facilitate informed decision-making.”

#### Rationale:

Although the dissemination of CoC meeting minutes can undoubtedly foster open access, it should be recognised that homebuyers may not be able to fully comprehend the complexities of legal and financial jargon used in such documents, and as such, misunderstandings may arise and, may further lead to more confusion instead clarity. The AR, being a knowledgeable intermediary, can play a great role in bridging this gap. The AR can clarify difficult issues by breaking down difficult ideas or jargon into straightforward terms through meetings. Furthermore, the AR will be able to explain the rationale behind different decisions and their implications on homebuyers. Lastly, the AR is in a position to answer questions, reducing uncertainties and doubts that homebuyers may face. Overall, by providing enough information as well as support to the homebuyers, the AR can facilitate informed decision making.

## **7. Streamlining Possession Handover in Real Estate Projects**

#### Issue in brief:

The IIIPI Report emphasizes the critical importance of clarity on the transfer of possession in proposals for real estate projects under the CIRP. In the real estate business, one of the serious problems emerges when construction ends, the creditors (e.g., homeowners) have made their financial commitments, and ownership transfer is not taking place (i.e., purchase order and sales deed/registration). Previously, homebuyers who had taken possession of their units were grouped with those who had not, leaving them with no viable remedy except being entitled to a refund. This

methodology did not recognize the unique situation of buyers who had already moved into their homes, generating uncertainty and violating their rights.

#### Summary of Proposal:

In real estate, immovable property is a crucial asset inventory for daily business operations, and it impacts revenue on the Profit Loss Statement. Previously, buyers who received possession were grouped with others in the case of builder insolvency, left only with refund options. According to the proposal, units purchased by fully paid homebuyers in the possession of units should be exempted from CIRP, which will be formalized in the registration. A final "as is" option is also available to them, by making the remaining balance, with review by and CoC approval from RP.

#### Comments:

It has been proposed that the RP be authorized to transfer the ownership of plots, apartments or buildings to allottees during the resolution process, subject to the approval of the CoC. This also includes a handover of possession on an 'as is' basis or on payment of the balance amount, if any, in order to expedite the resolution process and not cause unwarranted delays. Earlier, allottees of insolvent real estate firms had limited rights (mainly refunds). The amendment is progressive but requires safeguards against misuse.

#### Potential Risks and Suggestions-

- There can be an abuse of regulation to accept partial units as a possession to avoid obligations. Validity of possession must be supported by an Occupancy Certificate and adherence to the construction standards. Readiness to be established must be ensured through third-party inspections before allowing exclusion from the liquidation estate.
- The process of asset segregation during insolvency would delay the interests of the homebuyers for developers. To overcome this, the criteria for the exemption of assets under Section 36(4)(e) of the IBC must be crystallized. The regulatory check of the IBBI must also be strengthened through an audit of decisions on asset segregation to ensure that no party is adversely affected by this.
- The Proposal should protect homebuyers who have paid significantly but lack possession, ensuring they aren't treated as unsecured creditors. Mechanisms must enforce developers' obligations, like repairing defects or providing promised amenities, to prevent undue burdens on buyers, especially in cases involving incomplete units.

India can also significantly benefit by incorporating provisions inspired by German and US laws for real estate insolvency resolution.

- In Germany, priority notice of conveyance, as recorded in the land register, protects buyers during insolvency proceedings by securing their right to claim real property transfer regardless of the developer's insolvency. The same mechanism in India has the potential to shield homebuyers by providing for possession or transfer of ownership and, therefore, preventing developers from manipulating the insolvency regime.
- At the same time, the US approach to Section 365 of the US bankruptcy code allows the courts to either cash out or cancel executory contracts, offering clarity and flexibility. In the Indian context, executory contracts where obligations like payment by allottees or possession handover by developers remain incomplete currently lack clear legal provisions.
- A special section on executory contracts in Indian insolvency laws can characterize the rights and liabilities of the parties, thereby clarifying the scenario and preventing litigation. This would also guarantee a fair solution which safeguards homebuyers' investment and enables developers to also perform their liabilities.

#### Rationale:

The proposal addresses the longstanding ambiguity surrounding allottees who have taken possession of units during the CIRP. Traditionally, RPs and IRPs could not transfer ownership, therefore the ownership transfer usually happened without proper conveyancing or due diligence of the units and left the units under legal hold of the corporate debtor. In this new proposal, property ownership has been defined clearly, thereby greatly improving homebuyer protection. If title transfer is allowed during the CIRP, the proposal guarantees that purchasers will not be unduly treated as unsecured creditors, who would otherwise only recover their entitlements as refunds. This provision is intended to reduce lengthy litigation and speed up the litigation process. In addition, it provides relief to ongoing cases by ensuring justice to affected buyers. Although the amendment supports protection for the homebuyer, the must also provide fairness to the homebuyer and financial creditors. With borrowings from German and US law, for example, priority notice of conveyance and executory contract provisions, real estate insolvency proceedings in India could be streamlined even further.



