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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

EXAMINING THE NEED FOR SECTORAL APPROACH TO INSOLVENCY RESOLUTION IN INDIA

AUTHORED BY - ANIRUDH H

Abstract

The Insolvency and Bankruptcy Code (IBC), 2016, represents a landmark reform in India's insolvency framework, aiming to facilitate time-bound and efficient insolvency resolution across sectors. However, its sector-agnostic design has proven inadequate for industries with unique operational and financial complexities, such as real estate, airlines, and energy. This article examines the limitations of the IBC's uniform approach, particularly highlighting the inefficiencies in insolvency resolution in these sectors. The real estate industry, characterized by project-specific timelines and financing structures, has prompted the introduction of "project-wise" insolvency resolution. Similarly, the airline sector's global regulatory frameworks and aircraft leasing arrangements necessitate an insolvency regime aligned with international standards, as exemplified by recent government exemptions of aircraft-related assets from the IBC moratorium. These developments underscore the need for a sector-specific insolvency framework to address the distinct challenges of critical industries. A tailored approach would not only expedite the resolution process but also maximize value for stakeholders and foster greater confidence in India's insolvency regime. This article argues that adopting sector-specific mechanisms would strengthen India's insolvency framework, better accommodate industry-specific concerns, and contribute to long-term economic growth and stability. The proposal for sectoral insolvency frameworks deserves serious consideration to create a more resilient and responsive system.

Keywords: Insolvency, Real Estate, Project-wise CIRP, Airlines Sector

Introduction: the Insolvency Framework in India

The Insolvency and Bankruptcy Code, 2016¹ ("IBC") is a comprehensive and watershed legislation enacted to provide for the timely resolution of insolvency and bankruptcy cases in India. Enacted in 2016, the IBC has acted as an important instrument for the recovery of

¹ Insolvency and Bankruptcy Code, 2016.

defaulted loans and reduction of non-performing assets (“NPAs”) of banks and financial institutions restructure and revive the financial and economic health of companies and individuals facing debt. The objective of the Code involves the creation of time-bound and efficient legal framework for insolvency resolution and seeks to provide a comprehensive mechanism for both, personal and corporate insolvency in India.² The scope of the Code includes all commercial entities including companies, Limited Liability Partnerships, partnership firms, Micro, Small and Medium Enterprises and individuals.³ Another important feature of the code is the hierarchy of insolvency resolution mechanisms, involving a moratorium on all legal action by creditors from the date of admission of the case to an insolvency professional. Other resolution mechanisms include a corporate insolvency resolution plan, liquidation of assets, and the distribution of proceeds among the creditors. The implications of the code affect all stakeholders including creditors, debtors, and insolvency professionals.⁴

The Corporate Insolvency Resolution Process (“CIRP”) envisaged by the Code applies to corporate entities, such as LLPs, companies, and other corporate persons. The CIRP may be initiated by the corporate debtor or the creditor.⁵ The process involves the appointment of an interim resolution professional (“IRP”) to manage the affairs of the corporate debtor, who prepares a resolution plan that is subsequently submitted to the Committee of Creditors (“CoC”) for approval. Subsequent to the approval by the CoC the plan is then submitted to the National Company Law Tribunal (“NCLT”) for approval.⁶ The IBC is however, a sector-agnostic law, aimed at the enactment of a comprehensive legislation for all sectors, creating unique problems in sectors such as real estate sector and airlines sector.

Insolvency Resolution: the Straight Jacket Approach

The Code has not been as effective in its endeavour at creating a regime of time-bound Insolvency Resolution mechanism as envisaged. As reflected in a study of cases in India, all sectors have resolution delays, with the wholesale and retail trade sectors taking 236 days to get approvals for a resolution plan, construction sector taking 279 days and electricity and other sectors taking approximately 197 days. The same study further suggested that a

² *Insolvency and Bankruptcy Code (IBC) in India and Its Impact on the Economy*, 3.3 JCLJ (2023) 1216.

³ *Insolvency and Bankruptcy Code*, 2016, s. 2(c) & s. 4(1).

⁴ *Insolvency and Bankruptcy Code (IBC) in India and Its Impact on the Economy*, 3.3 JCLJ (2023) 1216.

⁵ *Insolvency and Bankruptcy Code*, 2016, s. 6

⁶ *Insolvency and Bankruptcy Code (IBC) in India and Its Impact on the Economy*, 3.3 JCLJ (2023) 1216.

corporate debtor from the service industry is subjected to more delays as compared to the manufacturing and non-servicing industry.⁷ These delays are caused due a multitude of reasons including non-suitability of uniform, straight jacketed approach resolution strategies and timelines across the sectors.

Therefore, new proposals to amend the IBC seek a special mechanism for the real estate sector, such as project-wise resolutions have been raised and adopted as well.⁸ However, there also has been a growing consensus among experts that India, like the United Kingdom, needs separate insolvency processes for several other industries, such as airlines, power utilities and telecommunications. A separate process for such critical sectors, it is argued, would enhance value maximization and the protection of corporate debtors.⁹ These concerns on the need sector-specific insolvency resolution processes hold merit for two reasons: firstly, the general provisions of the IBC may not necessarily suit each sector, as these provisions might be counterproductive to value maximization in sectors such as real estate; secondly, certain sectors like aviation and finance are highly globalized, and are thus governed largely by international frameworks, which India should aim to harmonise municipal law with, thus necessitating sector specific provisions for insolvency resolution. Two sectors i.e. real estate and airlines sectors that require such sector specific mechanisms for insolvency resolution have been recognised and discussed in the article to demonstrate the need for the change in approach under the IBC.

Real Estate Sector: Challenges and Emerging Trends

In recent years, the real estate sector has become increasingly susceptible to financial distress, necessitating a robust insolvency resolution framework to mitigate adverse effects. Inefficiencies in bankruptcy laws have negatively impacted the resolution of financial distress in diverse sectors, including real estate, where the lack of prompt resolutions can lead to prolonged project delays and diminished investor confidence.¹⁰ However, the standard

⁷ Neeti Shikha, The case for a sectoral approach to insolvency resolution in India Mint (2023), <https://www.livemint.com/opinion/columns/the-case-for-a-sectoral-approach-to-insolvency-resolution-in-india-11675355567427.html#selection-2083.13-2091.422> (last visited Oct 10, 2024).

⁸ Satyasrikant Vutha & Vaidehi, Real estate: Ibfi notifies project wise resolution rules Lexology (2024), <https://www.lexology.com/library/detail.aspx?g=4d79aaaa-3ca1-45de-8db5-eb5dd04501e8> (last visited Oct 10, 2024).

⁹ Neeti Shikha, The case for a sectoral approach to insolvency resolution in India Mint (2023), <https://www.livemint.com/opinion/columns/the-case-for-a-sectoral-approach-to-insolvency-resolution-in-india-11675355567427.html#selection-2083.13-2091.422> (last visited Oct 10, 2024).

¹⁰ Cirmizi, Elena, Klapper, Leora, Uttamchandani, Mahesh , "The challenges of bankruptcy reform"

mechanism for insolvency resolution in the Insolvency and Bankruptcy Code has not fared very well due to the nature of the industry. The real estate sector in India consists of development or brokerage across housing, retail, hospitality and commercial properties. Financing in the sector is usually undertaken on a project-to-project basis, and therefore, the construction timelines for each project of a company are distinct from one another. This practice of the sector presents challenges for the resolution of insolvency. The high incidence of real estate companies being admitted into insolvency proceedings, has only added to the complexity in question. As evidenced by the data provided by the Insolvency and Bankruptcy Board of India, ("IBBI") the real estate sector accounted for the second highest number of insolvency resolution cases, comprising 21% of the CIRPs initiated in India.¹¹ This lack of effective insolvency resolution mechanism under the Code has prompted judicial innovation, subsequently adopted through enactments and amendments to address the unique challenges presented by the sector.

The friction between the peculiarities of the real estate sector and the Code first manifested in the question of whether allottees of residential houses or 'homebuyers' were financial creditor or operational creditors during the CIRP. The Code recognises two broad categories of creditors: financial creditors and operational creditors, on the basis of the underlying transaction with the debtor and the creditor. However, homebuyers were not specifically included in either of these categories in the Code as originally enacted.¹² This determination of the status of homebuyers as either financial or operational is crucial during CIRP as the rights available to these categories of creditors are distinct. While both financial and operational creditors may initiate a CIRP, crucial commercial decisions such as approval of a resolution plan for rescue of corporate debtor or commencement of liquidation process and confirmation of the insolvency professionals can only be made by the committee of creditors ("CoC") that includes only financial creditors. In *Chitra Sharma v Union of India*,¹³ the Supreme Court noted the lack of clarity in the status of homebuyers under the Code as acting to the detriment of their interests and thus permitted homebuyers to participate in the CoC through a representative to ensure that they have sufficient representation in the CIRP to secure such interests.¹⁴ Subsequently, the Insolvency and Bankruptcy Second (Amendment)

¹¹ Shardul Amarchand Mangaldas & Co., Insolvency 2023, Chambers&Practice, <https://practiceguides.chambers.com/practice-guides/insolvency-2023/india>

¹² Shardul Amarchand Mangaldas & Co., Insolvency 2023, Chambers&Practice, <https://practiceguides.chambers.com/practice-guides/insolvency-2023/india>

¹³ *Chitra Sharma v Union of India* W.P. (C) 744 of 2017.

¹⁴ Shardul Amarchand Mangaldas & Co., Insolvency 2023, Chambers&Practice, <https://practiceguides.chambers.com/practice-guides/insolvency-2023/india>

Act of 2018 was enacted to clarify the issue, clarifying that the status of homebuyers under the Code would be that of 'financial creditors.' The Supreme Court, in the case of *Pioneer Urban Land and Infrastructure Ltd. v Union of India*¹⁵ upheld the constitutional validity of the amendment.

Other sector-specific measures undertaken for the benefit of the real estate sector include the adoption of alternative resolution practices such as 'reserve-CIRP' and 'project-wise CIRP'. These concepts were first espoused by the NCLAT in *Flat Buyers Association Winter Hills-77 v Umang Realtech Private Limited*.¹⁶ The NCLAT in the case, refers to insolvency resolution process of a real estate company that is to be restricted to the 'project in default.' Other projects which may be at very different stages of construction and are financially healthy and viable should not be subjected to unwarranted resolution under the Code. It was held therein that the assets of the project in default should be maximized for balancing the interests of the creditors of the project in default and achieving the object of the Code.¹⁷ In *Ram Kishor Arora (Suspended Director of M/S Supertech Ltd.) v Union Bank of India*,¹⁸ the NCLAT passed an interim order converting the CIRP of Supertech Ltd. into a 'project-wise' CIRP and thereby confining the CIRP to the distressed project alone. The appeal against the judgement was moved before the Supreme Court. However, the apex court dismissed the appeal for grant of interim relief and refused to interfere with the NCLAT's order, holding that constituting a CoC for Supertech Ltd. as a whole would affect the ongoing projects and cause immense hardship to the homebuyers while throwing every project into a state of uncertainty.¹⁹

The innovative measure of project-wise CIRP was adopted by the IBBI in the form of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2024 following the Supreme Court judgement and the discussion paper by IBBI.²⁰ These innovations represent the underlying friction between the

¹⁵ *Pioneer Urban Land and Infrastructure Ltd. v Union of India* AIR ONLINE 2019 SC 838

¹⁶ *Flat Buyers Association Winter Hills-77 v Umang Realtech Private Limited* 2020 SCC OnLine NCLAT 1199

¹⁷ Sandeep Bhuraria & Parijat, The paradigm of real estate insolvencies: Judicial trends, roadblocks, and The way ahead Live Law (2024), <https://www.livelaw.in/law-firms/law-firm-articles-/paradigm-of-real-estate-insolvencies-judicial-trends-challenges-and-roadblocks-cirp-ibbi-253531> (last visited Oct 10, 2024).

¹⁸ Order dated 27.07.2022 of NCLAT in Company Appeal (AT) (Ins.) No. 406 of 2022

¹⁹ Sandeep Bhuraria & Parijat, The paradigm of real estate insolvencies: Judicial trends, roadblocks, and The way ahead Live Law (2024), <https://www.livelaw.in/law-firms/law-firm-articles-/paradigm-of-real-estate-insolvencies-judicial-trends-challenges-and-roadblocks-cirp-ibbi-253531> (last visited Oct 10, 2024).

²⁰ Discussion Paper: Real Estate Related Proposals-CIRP & Liquidation [November 6, 2023].

peculiarities of the real estate sector and the uniform approach of the Code towards insolvency resolution.²¹ The necessity for a sector-specific insolvency resolution mechanism is thus evident and need to be considered for the a better insolvency regime in India.

Airlines Sector: International Framework and the IBC

The airlines sector, characterized by its intricate dynamics and global interconnectedness, is pivotal to the economic landscape, particularly within the context of India's insolvency resolution framework. The sector faces unique challenges stemming from fluctuating fuel prices, regulatory pressures, and intense competition from both domestic and international carriers. The sector has also attracted the attention of the Union Government, with programmes such as Ude Desh Ka Aam Nagrik Scheme, 2016, that aims to revolutionise air travel by augmenting infrastructure in Tier-II and Tier-III cities and to operationalise flights to smaller regional airports.²² Aircraft leasing has become the most popular mode of operation in the aviation industry. Airline companies choose to rent aircrafts and thus reduce the risk involved in the purchase of a new aircraft.²³ The sharp rise in the market size of the tourism and specifically, the airlines sector has witnessed the growth of the market for aircraft leasing as well, with around eighty percent of commercial aircraft in India being leased as opposed to fifty-three percent globally.²⁴

This sector has also gained additional notoriety with the government actively developing an effective mechanism enabling aircraft financing and leasing in India.²⁵ The GIFT City boasts of India's maiden International Financial Services Centre with an aircraft leasing and financial ecosystem, and various tax incentives to give a boost to the aviation sector in India. However, a lack of a conducive environment for lessors can act as a deterrent to the growth of the industry, even as the government seeks to promote aircraft leasing through interventions the form of programmes and policies.

²¹ Satyasrikant Vutha & Vaidehi, Real estate: Ibbi notifies project wise resolution rules Lexology (2024), <https://www.lexology.com/library/detail.aspx?g=4d79aaaa-3ca1-45de-8db5-eb5dd04501e8> (last visited Oct 10, 2024).²² Ministry of Civil Aviation, Press Release No. 1971506 (Issued on October 26, 2023)

²² Ministry of Civil Aviation, Press Release No. 1971506 (Issued on October 26, 2023)

²³ PRICE WATERHOUSE COOPERS, Aircraft Leasing in India: Ready to Take Off, February 2021, available at <https://www.pwc.in/assets/pdfs/research-insights/2021/aircraft-leasing-in-india-ready-to-take-off.pdf> (Last visited on July 28, 2023).

²⁴ POLARIS MARKET RESEARCH, Aircraft Leasing Market Share, Size, Trends, Industry Analysis Report, October 2023, available at <https://www.polarismarketresearch.com/industry-analysis/aircraft-leasing-market>

²⁵ WORKING GROUP ON DEVELOPING AVENUES FOR AIRCRAFT FINANCING AND LEASING ACTIVITIES IN INDIA, Project Rupee Raftaar: Development of Aircraft Financing and Leasing in India, Report of the Working Group (January 10, 2019)

Particularly, in the event of an insolvency, it is important to ensure a robust mechanism to ensure the repossession of the leased aircrafts by the lessors to foster a commercially strong airlines sector. Repossession of aircraft by the lessor is as important as the lease itself. It is a two-tiered process which involves first, the de-registration of the aircraft, and subsequently, the export of the aircraft.²⁶ In India, §30(7) and §32A of the Aircraft Rules 1937 provide for this upon default on payments by the lessee.²⁷ Upon default, the lessor submits a request to the Director General for Civil Aviation ('DGCA') which must be honoured, and export of the aircraft should ideally be facilitated within five days of acceptance of such request.²⁸ However, in reality, the de-registration gets further delayed due to the frivolous procedural requirements insisted upon by regulators,²⁹ such as the grant of Non Objection Certificate by the lessee and detainment of the aircraft due to the non-payment of dues to third party service providers.

This conundrum is addressed by the Cape Town Convention ("CTC") signed by India in 2001. CTC is a treaty that seeks to increase the financing and leasing of aircraft and enhance legal certainty in the process.³⁰ The treaty recognises the cross border nature of the leasing of mobile equipment and the uncertainty of lessor's interests due to inconsistent national laws, and thus create an autonomous framework for such interests.³¹ The CTC and its Protocol protect the interests of the lessors by seeking to harmonize the laws relating to aircraft leases and repossession of aircraft.³² India being a dualist country however, the provisions of the CTC, cannot become law in India until the Parliament brings a law to that effect as per Article 253 of the Constitution.³³ This creates a legislative gap regarding the question of repossession of aircraft in the event of the insolvency of the airline.

²⁶ INSOL INTERNATIONAL, Aircraft Repossession Upon a Default - a Review of the Issues in the United Kingdom, USA, India and Nigeria, November 2019, available at <https://brownrudnick.com/wp-content/uploads/2019/12/INSOL-International-Restructuring.pdf> (Last visited on December 28, 2023).

²⁷ The Aircraft Rules, 1937, R. 30(7).

²⁸ The Aircraft Rules, 1937, R. 30(7).

²⁹ DVB Aviation Finance Asia PTE Ltd v. Directorate General of Civil Aviation, WP (C) 7661/2012.

³⁰ Donal Patrick Hanley, AIRCRAFT OPERATING LEASING: A LEGAL AND PRACTICAL ANALYSIS IN THE CONTEXT OF PUBLIC AND PRIVATE INTERNATIONAL AIR LAW (Walters Kluwer, 3rd edn., 2021).

³¹ Anton Didenko, A Historical Overview of the Basic Concepts of the Cape Town Convention (Part I): 'International Interest' and 'Internationality', Vol. 6 CAPE TOWN CONV. J. (2017).

³² Protocol to The Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, 2367

U.N.T.S. 517 (adopted on November 16, 2001, entered into force on March 1, 2006)

³³ The Constitution of India, 1950, Art. 253; Jolly George Vergese v. Bank of Cochin, 1980 SCR (2) 913; State of West Bengal v. Kesoram Industries, (2004) 10 SCC 201.

However, following the widespread criticism of the insolvency resolution mechanism in the Go Airlines (India) Limited case in India, the Ministry of Corporate Affairs (“MCA”) has taken positive steps in this regard. The aircraft lessors in the case complained on the lack of adherence of India to the CTC and the violation of their rights under the treaty due to the moratorium under the Code that was issued. Hence, in 2023, the MCA issued a notification pursuant to Section 14(3) of the IBC exempting arrangements relating to aircraft, aircraft engines, airframes and helicopters from the moratorium under Section 14(1) of the IBC.³⁴

The notification issued by the MCA sent was a gesture by the state to the international aviation community that India is keen on complying with its obligations under the Cape Town Convention. Subsequently, the Aviation Working Group, the international aviation watchdog that had downgraded India's compliance rating in the wake of Go First's insolvency, reversed India's outlook from negative to positive. The notification has aided the flourishing aviation industry in India by granting obvious benefits to aircraft lessors and creditors. It also benefits the airlines sectors in India due to the lowering of leasing and financing costs, resulting from lessors and creditors having greater confidence in the Indian legal regime to protect their interests.³⁵

Despite these positive developments, the broader issue of the airline industry requiring a more tailored insolvency resolution mechanism remains. A sector-specific framework would recognise the importance of swift aircraft repossession and align with global best practices, thereby creating a more favourable environment for lessors. Ensuring that repossession processes are efficient and unimpeded by procedural delays is crucial for reducing leasing costs and fostering investor confidence. This, in turn, would benefit Indian airlines by lowering financing costs, making them more competitive in the global market.

Conclusion

While the Insolvency and Bankruptcy Code (IBC) of 2016 has established a robust legal framework for managing insolvencies, its broad, uniform application across industries has revealed significant gaps. The diverse challenges posed by sectors like real estate and airlines

³⁴ Aparna Ravi, Airline insolvencies and the exemption from the IBC Moratorium Aviation - Transport - India (2023), <https://www.mondaq.com/india/aviation/1383346/airline-insolvencies-and-the-exemption-from-the-ibc-moratorium> (last visited Oct 10, 2024).

³⁵ Tejas Velaga & Aastha Gupta, Airline Insolvency in India, 17 NUJS L. Rev. 1 (2024)

sectors highlight the limitations of a one-size-fits-all approach. Each industry has unique operational characteristics and financial dynamics that demand specific attention, which the current IBC does not fully accommodate.

For example, in real estate, where projects are often financed and executed on a case-by-case basis, a project-specific insolvency mechanism is crucial to safeguard homebuyers and ensure that construction timelines are met. The recent legislative innovation allowing for "project-wise" insolvency resolution is a positive step in this direction, but more comprehensive reforms are needed to address the underlying complexities of the sector. Similarly, the airline industry operates in a globalized environment with its own set of regulatory and financial challenges, such as aircraft leasing agreements and the need for swift repossession of assets in case of insolvency. The recent exemption of aircraft-related arrangements from the IBC's moratorium is a welcome development, signaling that the government is responsive to industry-specific needs. However, this change also underscores the importance of creating a more holistic, sector-specific framework for industries like aviation, where international standards and practices play a crucial role.

Adopting a sectoral approach to insolvency would enhance the overall efficiency of the resolution process by tailoring solutions to the unique needs of each industry. This would not only expedite the resolution timeline but also maximize the value for all stakeholders—creditors, investors, and employees alike. Furthermore, by addressing the specific operational and financial structures of key industries, such a framework would foster greater confidence in India's insolvency regime, both domestically and internationally. Ultimately, moving towards a sector-specific insolvency framework is essential for ensuring that India's insolvency regime is dynamic, resilient, and responsive to the evolving needs of its economy. By recognizing the peculiarities of each sector and crafting targeted solutions, India can enhance its legal and financial infrastructure, promote economic stability, and support long-term growth across various industries. The benefits of such a system would not only improve outcomes in insolvency proceedings but also contribute to a more investor-friendly and globally competitive economy. Therefore, it is imperative that the proposal for sector-specific insolvency mechanisms be given serious consideration, as it holds the potential to significantly strengthen India's approach to corporate distress and recovery.