

THE HORIZON

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Recognition of Homebuyers: Sympathy Without Security



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Recognition of Homebuyers: Sympathy Without Security

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The fate of homebuyers when a real estate developer (RED) undergoes a corporate insolvency resolution process (CIRP) under the Insolvency and Bankruptcy Code, 2016 (IBC), has been intensely deliberated. An amendment of the IBC through an ordinance of 6th

June, 2018 recognized the rights of homebuyers in a CIRP by deeming the amounts they pay to a RED to have the “commercial effect of a borrowing”, thus clearly making them financial creditors. Homebuyers may now initiate a CIRP and will have representation in the committee of creditors (CoC), u/s 7 of the IBC, with voting rights in proportion to the

amounts they have paid to a RED. This is reflected in amendments dated 3rd July, 2018 to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, which lay down the procedure for appointing an “Authorized Representative” in respect of a class of creditors.

Under this amendment, the interim resolution professional has been mandated to appoint three insolvency professionals to represent the interests and concerns of each class of creditors. The homebuyers being a specific class of creditors, they will be assigned one insolvency professional who will represent the interest of homebuyers – as a class – and exercise their voting rights in the CoC, in proportion to their financial debt.

However, despite the changes brought about by the recent ordinance, protection and preservation of the rights of homebuyers lies only in the due approval and implementation of a resolution plan for the RED. Where the resolution plan is not approved or agreed, the RED will face liquidation.

With resolution of the RED, homebuyers may get their homes or a refund of part of their investment as may be decided by the CoC, where they have representation and voting rights. However, if a resolution plan cannot be finalized and approved, and the RED goes into liquidation

homebuyers may get nothing as they will be ranked as unsecured creditors and, with the staggered priority for recovery of dues under section 53 of the IBC, will lose out to creditors with security interest, who have a prior claim over the amounts that are realized from liquidating assets of the RED. Thus, banks and other financial institutions will appropriate to themselves the majority of the RED's assets, leaving little for the unsecured homebuyers.

To give some perspective to the unfairness that will be suffered by unsecured homebuyers, one may contrast this outcome with the example of shareholders, who occupy the lower rungs of the distribution mechanism under section 53 of the IBC. They justifiably stand a much lower chance of recovery in the event of liquidation because, as investors in the RED, they have knowingly subscribed to the inherent risk of failure of the RED's business enterprise. This means that the sympathy shown by deeming

homebuyers as financial creditors is superficial and affords no actual relief, when viewed in the context of a liquidation scenario.

Thus, owing to the lower priority, if unsecured homebuyers do not recover amounts they have advanced, through the approval of a Resolution Plan, the IBC and the 2018 ordinance do not in any manner come to the rescue of such homebuyers. No protection has been afforded to homebuyers for recovery of the amounts at the stage of liquidation. Thus, it may be that the IBC and the 2018 Ordinance could fail to comprehensively protect the interests of home buyers, which prevail at the stage of both resolution as well as liquidation. For this reason, the scope of the 2018 Ordinance is incomplete; its application being limited to only the resolution process and its provisions may need to be re-looked in a liquidation scenario.

However, the present state of affairs serves as a compelling factor to motivate the homebuyers to push for a viable resolution plan in order to recover its dues. The stranded home buyers of the insolvent Jaypee Infratech Ltd. ('JIL') are a case in point: They have vehemently opposed a proposal by Jaiprakash Associates Ltd. ('JAL'), to reacquire JIL. The home buyers have validly argued before the Supreme Court that an entity that is itself insolvent and is debarred by the amended Section 29A of the IBC cannot take over the management of JIL. This point is strengthened by the fact that the delay and non-delivery of flats is majorly attributable to the mismanagement by JAL. The fact that the Supreme Court has been taking into account the concerns of the home buyers at every stage of the insolvency process only serves to emphasize that it is indispensable that the voice and concerns of the home buyers be made part of the entire insolvency proceedings under the IBC.



Recent Updates

President Approves Promulgation of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018

The President today gave assent to promulgate the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

The Ordinance provides significant relief to home buyers by recognizing their status as financial creditors. This would give them due representation in the Committee of Creditors and make them an integral part of the decision making process. It will also enable home buyers to invoke Section 7 of the Insolvency and Bankruptcy Code (IBC), 2016 against

errant developers. Another major beneficiary would be Micro, Small and Medium Sector Enterprises (MSME), which form the backbone of the Indian economy as the biggest employer, next only to the agriculture sector. Recognizing the importance of MSME Sector in terms of employment generation and economic growth, the Ordinance empowers the Government to provide them with a special dispensation under the Code.

Securities and Exchange Board of India (Real Estate Investment Trusts) (Amendment) Regulations, 2018

In exercise of the powers conferred by section 30 read with sections 11 and 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board hereby makes the following regulations to further amend the Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014, namely,-

1. These regulations may be called the Securities and Exchange Board of India (Real Estate Investment Trusts) (Amendment) Regulations, 2018.

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

3. In the Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014, I. in regulation 2, in sub-regulation (1), - a. in clause (g), in Explanation to sub-clause (ii), the word "more" shall be substituted with the words "not less".

President promulgated Ordinance to amend the Commercial Court, Commercial Division of High Courts Act

On 3rd May 2018, the President promulgated ordinance to amend the Commercial Court, Commercial Division of High Courts Act. The key amendment includes reducing the limit of specified value of a commercial dispute from ₹ 1 Crore to ₹ 3 Lakhs. The amendment also provides for establishment of commercial courts at district judge level for the territories over which the High Court's Chennai, Delhi, Kolkata, Mumbai & Himachal have ordinary original civil jurisdiction.

Cabinet approves Fugitive Economic Offenders Ordinance, 2018

The Fugitive Economic Offenders Ordinance, 2018 has come into force as the President of India has given his assent on 21st April, 2018. It seeks to confiscate properties of economic offenders who have left the country to avoid facing criminal prosecution.

The Ordinance makes provisions for a Court ('Special Court' under the Prevention of Money-laundering Act, 2002) to declare a person as a Fugitive Economic Offender. A Fugitive Economic Offender is a person against whom an arrest warrant has been issued in respect of a scheduled offence and who has left India so as to avoid criminal prosecution, or being abroad, refuses to return to India to face criminal prosecution. A scheduled offence refers to a list of economic offences contained in the Schedule to this Ordinance. Further, in order to ensure that Courts are not overburdened with such cases, only those cases where the total value involved in

such offences is 100 crore rupees or more, is within the purview of this Ordinance. The Fugitive Economic Offenders Ordinance, 2018, inter alia provides for-

- I. making an application before the Special Court for a declaration that an individual is a fugitive economic offender;
- II. attachment of the property of a fugitive economic offender and proceeds of crime;
- III. issue of a notice by the Special Court to the individual alleged to be a fugitive economic offender;
- IV. confiscation of the property of an individual declared as a fugitive economic offender or even the proceeds of crime;
- V. disentitlement of the fugitive economic offender from defending any civil claim; and
- VI. appointment of an Administrator to manage and dispose of the confiscated property under the Act.

Deals & More



Panchsheel Buildtech Private Limited is one of the leading real estate developer of Delhi/NCR. Dhir & Dhir Associates acted as legal counsel to Panchsheel Buildtech Private Limited for the non-convertible debenture issued by the Company.

The NCDs are secured by security of the movable and immovable assets of the Company pertaining to the

following projects – (i) residential project under the name and style of “Panchsheel Greens” with FAR of 3.5, being developed on the land admeasuring 52,850 square metres, situated at Plot No. GH-01A, Sector-16B, Greater Noida, in the state of Uttar Pradesh, India, (ii) residential project under the name and style of “Panchsheel Pebbles” with FAR of 2.5 being developed on the land admeasuring 7,768 square meters situated at Plot No. GH-1(18A), Vaishali Scheme, Sector-03, Ghaziabad, in the state of Uttar Pradesh, India, and (iii) residential project under the name and style of “Panchsheel Pratishtha” with

FAR of 2.75 being developed on the land admeasuring 20,000 square metres situated on plot bearing no. GH-16, Eco City, Sector-75, Noida, District Gautam Budh Nagar, Uttar Pradesh and the receivables of the aforesaid real estate projects and other assets.

The scope of work included conducting title search on the immovable assets offered as security for the NCDs issued by the Company, conducting corporate due diligence on the Company and structuring the transaction and drafting of the transaction documents, getting the NCDs listed on the wholesale debt segment of BSR and post issuance compliance.

Saha Estate Developers Private Limited is a prestigious real estate company in India – provides exemplary sustainable buildings in Delhi/ NCR. Dhir & Dhir Associates acted as legal counsel to Saha Estate Developer Private Limited for the non-convertible debenture issued by the Company.

The NCDs are secured by the movable and immovable assets of the Company



pertaining to the group housing project being developed by it on the land situated at District Gautam Budh

Nagar, Noida, in the State of Uttar Pradesh.

The scope of work included conducting title search on the immovable assets offered as security for the NCDs issued by the Company, conducting corporate due diligence on the Company, structuring the transaction, drafting of the transaction documents and ensuring post issuance compliance.

GRT Jewellers (India) Private Limited - Dhir & Dhir Associates advised GRT Jewellers (India) Private Limited on land acquisition of 125 Acres at Kanakapura Taluk, Ramanagar District in the State of Karnataka, India.

The scope of work included legal advisory regarding acquisition of the land on sub-leasehold basis, drafting of



agreements to be entered into between the company, Karnataka Renewable Energy Development Limited and the land holders including MOUs, lease deeds, sub lease deeds and any other documents required at the time of registration and advising client on the various legal issues concerning acquisition of the said land.

L&T Finance Limited - Dhir & Dhir Associates acted as legal counsel to L&T Finance Limited for the financial assistance sanctioned to Raheja Developers Limited, for the long term working capital requirements and expenditure towards various ongoing

real estate projects of the Company.

The scope of work included drafting of transaction documents i.e. Agreement to Sell, General Power of Attorney and other ancillary documents.



Deals & More

DMI Finance Private Limited - Dhir & Dhir Associates offered legal advisory services to DMI Finance Private Limited which included structuring the transaction, drafting of financing and security documents and conducting due diligence on the borrower entity and the other secured properties.

The deal involved grant of financial assistance to Sushma Buildtech Limited and its associate companies, to be utilized for making payment of



the outstanding dues of the authority towards (i) the land admeasuring 2.35 Acres, situated in the revenue estate of

Village Gazipur, Tehsil Zirakpur, District SAS Nagar, in the State of Punjab on which residential project under the name and style of "JoynestZrk 1" is being developed and (ii) the land admeasuring 3.30 Acres situated in the revenue estate of Village Gajipur, Tehsil Zirakpur, District SAS Nagar, in the State of Punjab on which residential project under the name and style of "Grande Nxt" is being developed.

India Infoline Housing Finance Limited - Dhir & Dhir Associates offers legal services to India Infoline Housing Finance Limited, a company that provides secured loans and bridge financing through a suite of secured and unsecured loan products.

The deal involved grant of Vatika Limited, for the purpose of refinancing



the existing debts of the company and funding the development and construction of a plotted colony under the name style of "Vatika India Next" being developed by the Company on

the land admeasuring 1.5125 Acres situated at Sector 82, 82A, 83, 84 and 85 in village of Sihi, Shikohpur, Sikenderpur Badha, Gurugram Manesar Complex, in the state of Haryana.

The scope of work included advising on the structuring of the transaction and conducting due diligence on the secured properties.



National Aluminium Company Limited - Dhir & Dhir Associates is presently advising National Aluminium

Company Limited on acquisition of land parcel at different locations situated in the state of Tamil Nadu. The Firm has undertaken due diligence on the 3 land parcel at different locations offered by the bidders.

The scope of work included legal advisory on acquisition of the land, verification of approvals and clearances obtained and/ or to be obtained on the said land.

CSL Finance Limited - Dhir & Dhir Associates offers legal services to CSL Finance Limited, a company that provides secured loans and bridge financing to small and medium size corporates and has recently forayed into SME (small and medium) lending to fulfill the financial needs of small and medium enterprises (SME) through a suite of secured and unsecured loan products.



The deal involved grant of loan for the purposes of development of affordable group housing project under the name and style of "Laxmi Apartments" being

developed on the land situated in Village Gopalpur, Sub-Tehsil Kadipur and District Gurugram, in the state of Haryana on the land at Gurugram, Haryana.

The scope of work included structuring the transaction, drafting of financing and security documents, conducting due diligence on the borrower entity and the secured properties.

Thought Leadership



Keynote Address by Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates, on The Concept of Insolvency Professionals: Advantages, Drawbacks and Solutions in a Seminar on Insolvency & Bankruptcy Code - Demystified at Shangri-La Hotels and Resorts, New Delhi on 20th April, 2018



Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates, addressing the audience at the Seminar on Business Restructuring -Evolving Legal Issues and Imperatives organized by PHD Chambers of Commerce, New Delhi on 21st April, 2018



Mr. Girish Rawat, Partner, Dhir & Dhir Associates and Mr. KPS Kohli, Associate Partner, Dhir & Dhir Associates speaking at The Lex Witness 7th Annual Real Estate & Construction Legal Summit 2018, 18th May 2018, Le Meridien, Delhi

Thought Leadership



Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates, deliberating on the theme “Resolution Plan under Insolvency and Bankruptcy Code, 2016” at a seminar organized by “Delhi Study Circle of Insolvency Professionals” on 19th May, 2018



Ms. Namrta Sudan, Associate Partner, Dhir & Dhir Associates felicitated by the session moderator Ms. Lakshmi Menon, Country Counsel, Hewlett Packard Enterprise India at The Lex Witness 6th Annual Information Technology Legal Summit 2018, 8th June 2018 in Bengaluru. Ms. Sudan contributed her thoughts at the keynote session on Regulatory Rifles – The Rage Continues?



Mr. Girish Rawat, Partner, Dhir & Dhir Associates felicitated by the session moderator and veteran in the BFSI space Mr. Samir Hossain, Head Legal, Infrastructure & Structured Finance, Aditya Birla Finance at The Lex Witness 5th Annual Banking & Finance Legal Summit 2018 in Mumbai. Mr. Rawat contributed his thoughts at the session on The Indian Funding & Finance – On A Stop. Look & Go Mode?



Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates, deliberating on the theme “Resolution Plan under Insolvency and Bankruptcy Code, 2016” at a seminar organized by “Delhi Study Circle of Insolvency Professionals”. The elite gathering was also presided over by Hon'ble Member, National Company Law Appellate Tribunal, Shri Balvinder Singh.



Making Headlines

Business Standard

NCLT has exceeded expectations in terms of deciding cases in 2 Yrs: Experts

June 24, 2018 - Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates shares his opinion with Business Standard on NCLT's journey so far as it forays into its second year of legislation. **Read more at <https://lnkd.in/fwQYyhR>**

Even one homebuyer can now drag errant builder to NCLT: Govt Ordinance

June 7, 2018 - Mr. Nilesh Sharma, Senior Partner, Dhir & Dhir Associates shares his views with Business Standard on various ordinance standpoints that have led to noticeable amendments in IBC. **Read more at <https://lnkd.in/fYjsi7w>**

Essar Steel lenders to seek guidance from NCLAT on Mittal offer

May 16, 2018 - Creditors are seeking to recover dues by invoking corporate guarantees even as defaulters undergo insolvency proceedings in the National Company Law Tribunal (NCLT). Nilesh Sharma, Senior Partner at Dhir and Dhir Associates, said the code only granted the moratorium to a firm under resolution and not to a corporate guarantor.

Read more at <https://lnkd.in/f2WDnSN>

Homebuyers await Legal Remedy

April 30, 2018 - Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates, shares his critical opinion with Business Standard as Essar Steel plans to approach NCLAT to seek its guidance on the Rs 70 billion conditional offer made by ArcelorMittal.

Read More at <https://lnkd.in/f2WDnSN>

Uncertainty over how RERA provisions will play out for realty firms in NCLT

Apr 29, 2018 - Mr. Nilesh Sharma, Senior Partner, Dhir & Dhir Associates, sharing his views on 'Uncertainty over how RERA provisions will play out for realty firms in NCLT'. **Read More at <https://lnkd.in/ff3e8FA>**

Insolvency: Essar steel Lenders face tough call; CoC may seek fresh bids

April 20, 2018 - The Insolvency and Bankruptcy Code (IBC) is a new law and today's order would just help to make the IBC more robust. said Alok Dhir of Dhir & Dhir Associates. **Read More at https://lnkd.in/f-g_Z_f**



THE ECONOMIC TIMES

IBC Reboot: Relief for Home Buyers in Sight

May 24, 2018 - Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates, sharing his views with The Economic Times on recent IBC reboot. Will the much-awaited IBC reboot help lenders get their money back from defaulting companies?

Read more at <https://lnkd.in/f8BDHj5>

ArcelorMittal may return as Uttam Galva promoter

May 16, 2018 - Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates, shares his views with The Economic Times on the recent legal interpretation of the funds being kept in an escrow account in the ArcelorMittal matter.

Read more at https://lnkd.in/f_txd2D

Tata Steel facing trouble over Bhushan Steel Takeover

May 09, 2018 - Alok Dhir, Managing Partner, Dhir & Dhir Associates, shares his recommendations on smoothening the process for takeover and recovery. A classic case is the Tata-Bhushan Steel case featured in The Economic Times.

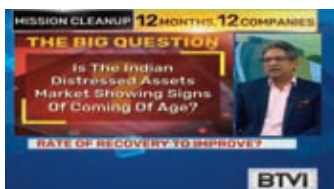
Read More at <https://lnkd.in/fZechHhK>

After NCLT order, Essar Steel lenders to decide on status of Numetal, Ruia contention

April 21, 2018 - "Rewant Ruia is one of the beneficiaries of the Aurora Trust. VTB Bank must have taken legal advice that being a beneficiary does not disqualify it," Alok Dhir of Dhir & Dhir Associates said. On Thursday, the NCLT deemed the second round of bids for Essar Steel invalid and directed the CoC to consider the first set of offers from Numetal and Arcelor-Mittal, ruling that the banks would have to decide on the eligibility of bidders rather than the resolution professional.

Read More at <https://lnkd.in/f-T7Gnf>

Electronic Media Coverages



'Mission Cleanup - 12 Months. 12 Companies'

Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates sharing his views on 'Mission Cleanup - 12

Months. 12 Companies' hosted by Siddharth Zarabi on BTVI. Will the next 12 months be more about liquidation and less about resolution?

Watch the episode at <https://lnkd.in/gfydyNQ>



Is Open Bidding the New Norm?

Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates demystifying the implications of the Binani Judgement - CoC

second bid's date during a panel discussion on BTVI.

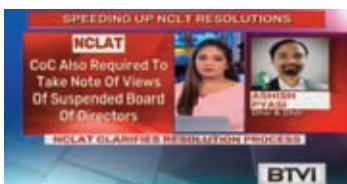
Watch the episode at <https://goo.gl/46WC6R>



Macros with Mythili - IBC - An Year Old Saga

IBC remains an epitome of benchmarks and learnings at the same time. Alok Dhir, Managing Partner,

Dhir & Dhir Associates sharing his views on ET NOW Live - Times Network Showcase Page during Macros with Mythili. Watch the episode at <https://lnkd.in/fUxif4i>



Speeding Up NCLT Resolutions

Ashish Pyasi, Senior Associate, Dhir & Dhir Associates, speaks to BTVI on NCLAT clarifying the

procedure that could speed up closure of the ongoing battle for Binani Cement. Watch the episode at <https://lnkd.in/fsJ5WVv>



JAYPEE Insolvency Saga - Battles for Homes

Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates, sharing his views on "Urban Reality: Should Jaypee Infra home buyers

be willing to take a haircut?" on CNBC-TV18. The Supreme Court has directed Jaiprakash Associates (JAL), the parent company of Jaypee Infratech (JIL), to deposit Rs 1,000 crore by June 15 for refunding to home buyers. Watch the episode at <https://lnkd.in/fQNHbeK>



India Development Debate

Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates, sharing his views with ET NOW Live - Times Network Showcase Page on the IBC reboot. Will the much-

awaited IBC reboot help lenders get their money back from defaulting companies? Watch the episode at <https://lnkd.in/gBYt8py>



Mr. Alok Dhir, Managing Partner, Dhir & Dhir Associates, sharing his views with ZEE Business after banks voted against a bid to revive the insolvency-hit Jaypee Infratech. Over 20,000 homebuyers stare at uncertainty,

triggering fresh moves to ensure that the firm does not face liquidation. Watch the episode at <https://lnkd.in/fNVzjT>



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