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LEGAL RISK IN INDIAN REAL ESTATE TRANSACTIONS

AUTHORED BY - VARUNA GOLAKIYA

- **Legal Risk Management: Definition and the Causal Framework:**

  Legal risk management, in the context of large-scale real estate and development projects, denotes the structured identification, assessment, and mitigation of legal risks arising at each stage of the transaction lifecycle — from pre-transactional due diligence through to corporate exit or insolvency resolution.

  The approach pursued in this Paper distinguishes between two categories of legal risk. The first is risk arising from drafting deficiencies or enforcement failures in individual instruments — errors that are, in principle, remediable at the level of individual documents or regulatory practice. The second — and the category this paper argues is dominant in large-scale Indian real estate transactions — is risk arising from the structural interaction between statutory regimes that were not designed to coordinate with each other. This second category is not remediable by improved drafting or tighter enforcement. It requires statutory coordination, or failing that, a coherent judicial doctrine capable of resolving regime conflict at the provision level. Both of those governance failures bring about a discrete transactional impact at a particular point in the real estate transaction life cycle. The signature argument of this Paper is the fact that the relationship between a governance failure and a transactional legal risk is not inferential - it can be traced reasonably at the level of provisions.

- **Pre-Transactional Due Diligence: Causal Origin in SPV Governance Vacuum:**

  Since the Companies Act of 2013, when applied to project-level special purpose vehicles, does not hold the SPV to the same level of governance compliance as the listed holding companies, the compliance history of the SPV, in the form of escrow compliance records under RERA, disclosure of related-party transactions, and records of board decisions, is not systematically documented in any form that would be accessible to a potential acquirer. The legislation which regulates title risk in transactions of Indian real estate is in the

ISSN: 2582-6433

Transfer of Property Act 1882. By that Act, title is transferred by a purchaser to be subject to the defects of title of the seller; there is no statutory title warranty against the seller on which the purchaser may rely. The buyer has the obligation of title investigation by use of privately-conducted due diligence. In the absence of statutory guarantees, judicial precedent tends to put title risk on the purchaser.[1]

Judicial definition of the standard of care of legal due diligence of large-scale land acquisitions, especially after the substantial expansion of benami prohibition under Benami Transactions (Prohibition) Amendment Act 2016, has not been adjudicated.[2]

The implications of this gap on the coherence of the pre- transactional risk regime are enormous. The project registration process of RERA - introduced by the section 3 of RERA - establishes a publicly available registry of registered developers, approved plans, and project specifications.[3] Practically, both retail homebuyers and sophisticated acquirers use RERA registration as a sign of the sufficiency of the title of the registered developer of the project land. This dependence is business logical but legally unfounded: The registration at RERA is no title guarantee. The resulting conflict of doctrines is as follows: the registration process of RERA creates a reasonable commercial reliance on consumers towards the title of the registered promoter, whereas RERA does not guarantee it explicitly. The effect of the RERA registration is that it will give an illusion of regulatory guarantee which is not provided under the law by the same tool that brings it into being.

There is another aspect of this conflict created by the vacuum of the SPV governance. An acquirer of a real estate SPV in a share deal transaction requires, as a minimum, access to the SPV's RERA escrow compliance records, related-party transaction history, and board meeting documentation. These records constitute the governance due diligence for the acquisition. But because the governance framework applicable to unlisted project-level SPVs does not systematically require the maintenance of such records in an auditable form — the obligations falling on listed holding companies under the Companies Act 2013 and SEBI's Listing Obligations and Disclosure Requirements Regulations do not extend to unlisted project-SPVs[4] — the documentation that governance due diligence requires is frequently not generated. The due diligence gap is therefore not a failure of practice; it is

[1] Transfer of Property Act 1882 (India), S:54–55.
[2] Benami Transactions (Prohibition) Amendment Act 2016 (India)
[3] Real Estate (Regulation and Development) Act 2016 (India) (RERA), S:3.
[4]Companies Act 2013 (India), SS: 134, 177, 188; SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (India), reg 23. These provisions impose governance and disclosure obligations at listed holding company level; unlisted project-SPVs are not required to maintain equivalent governance records.

ISSN: 2582-6433

a consequence of the regulatory framework's design.

The post-acquisition consequences of this gap are considerable. An acquirer who completes a share deal in respect of a RERA-registered project SPV inherits the SPV's RERA registration, and with it, the SPV's liability as the registered promoter under RERA.[5] If the prior promoter was in breach of escrow obligations under section 4(2)(l)(D) of RERA, or had entered into undisclosed related-party transactions affecting the project's completion trajectory, the acquirer — having assumed the promoter role by virtue of the registration transfer — inherits those liabilities. The IBC creates an additional dimension: transactions conducted by the SPV within the look-back period prescribed by section 43 of the IBC may be challenged as preferential transactions if the SPV subsequently enters CIRP.[6] An acquirer who has paid consideration for an SPV holding assets subsequently challenged as preferential faces post-closing losses where conventional due diligence mechanisms may be insufficient to identify risks arising from undocumented intra-group transactions.

The doctrinal incoherence at the pre-transactional stage is therefore this: the Transfer of Property Act 1882 places title risk on the buyer; RERA generates consumer reliance that it does not support with a title guarantee; the Companies Act does not require SPV-level documentation that would enable governance due diligence; and the IBC's preferential transaction mechanism may retrospectively impair the value of assets that appeared unencumbered at closing. No provision of any of these statutes coordinates these four interactions. Pre-transactional due diligence inadequacy is a causal consequence of the governance vacuum, and the documentation that adequate due diligence requires is not generated because the governance framework does not require it. The inadequacy of legal risk management arises not from defective drafting, but from the absence of reliable governance information.

- **Mergers and Acquisitions in Real Estate: Statutory Conflicts at Transaction Execution:**

  Real estate mergers and acquisitions produce doctrinal conflicts between the Transfer of

[5]RERA, s 15. The section requires prior written consent of two-thirds of the allottees and prior approval of the RERA authority before any transfer or assignment of the promoter's majority rights and liabilities in a registered project. No timeline is prescribed for RERA authority approval.

[6]RERA, s 15(2); Insolvency and Bankruptcy Code 2016 (India) (IBC), s 43. Section 15(2) imposes consent requirements with no prescribed timeline. Section 43 creates a preferential transaction avoidance mechanism with look-back periods of two years (related parties) and one year (unrelated parties) preceding the insolvency commencement date.

ISSN: 2582-6433

Property Act 1882, the Companies Act 2013, RERA 2016, and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 ('Takeover Code') that arise from the structure of the transaction itself, not from individual statutory failures. The share deal — the standard structure for real estate M&A, chosen to avoid the stamp duty that would be imposed on a direct asset transfer — produces a simultaneous interaction between all four statutory regimes in which no single transaction document can govern all four compliance obligations. There is limited statutory coordination between these regimes, resulting in interpretive uncertainty.

Under the Transfer of Property Act 1882, a transfer of shares in an SPV holding real property does not constitute a conveyance of that property.[7] The title to the property remains in the SPV; the acquirer gains indirect ownership through the shares. This structure is chosen precisely because it avoids the stamp duty applicable to a direct asset transfer. However, the title risk of the underlying land — which in an asset deal would have been allocated through the sale deed — is now allocated to the share purchaser through the pricing and warranty structure of the share purchase agreement. There is no standardised statutory warranty imposed on the seller in a share deal in respect of the underlying asset's title. The TPA's buyer-bears-risk principle is not modified by the corporate law governing the share transfer.

RERA imposes an additional compliance obligation on the transaction. Under section 15 of RERA, the transfer or assignment of any rights and obligations of the promoter in a registered real estate project must be made only with the prior written consent of two-thirds of the allottees, and with the prior approval of the RERA authority. Where the acquisition of an SPV constitutes, in substance, a change of promoter of a RERA-registered project, RERA's consent requirements must be satisfied before the new promoter assumes effective control of the project. In practice, this process is time-consuming: there is no prescribed timeline for RERA authority approval, and the mechanism for obtaining allottee consent is not specified in detail in the Act or its regulations.

The Takeover Code imposes a competing and incompatible timeline obligation where the target company is listed. Regulation 13 of the Takeover Code requires the acquirer to make a public announcement of an open offer upon acquisition of, or agreement to acquire, control over a listed company. The open offer must be completed within a prescribed

[7]Transfer of Property Act 1882 (India), s 55. In a share deal no conveyance of immovable property occurs; the seller's title obligations under s 55 do not apply directly to the target company's underlying land.

ISSN: 2582-6433

period that cannot be extended at the acquirer's discretion.[8] The practical consequence is a doctrinal conflict at the transaction execution stage: the Takeover Code requires completion of the open offer — and thereby the public assumption of control — within a timeline that cannot be extended to accommodate RERA's registration transfer process. An acquirer of a listed real estate company is required to complete an open offer before the RERA registration transfer has been completed or, in many cases, even applied for.

There is no statutory coordination mechanism explicitly addressing overlaps between SEBI Takeover Regulations and RERA. (The Supreme Court in Pioneer Urban Land & Infrastructure Ltd v Union of India (2019) 8 SCC 416 recognised that IBC and RERA claims may proceed concurrently.[9]) Section 88 of RERA provides that the Act's provisions are in addition to and not in derogation of any other law; this savings clause does not resolve the timeline incompatibility. The SEBI Takeover Code operates under the Securities and Exchange Board of India Act 1992 and the Companies Act 2013; RERA operates under its own statutory framework. The conflict is structural: it arises from the simultaneous application of two valid, independently enacted statutes to the same transaction on incompatible compliance terms. No delegated legislation, regulatory guidance, or judicial decision has addressed the interaction.

The exemption for related-party transactions between holding companies and their wholly-owned subsidiaries under the Companies Act 2013[10] means that intra-group transactions affecting the target SPV's RERA escrow compliance and land title may not be disclosed in the documents available to the acquirer during due diligence. An acquirer who discovers, post-closing, that the target SPV's RERA escrow account was deficient by reason of undisclosed intra-group fund transfers faces a situation in which RERA liability has transferred by virtue of the registration transfer, the contractual warranty claim against the seller may be inadequate in quantum, and no statutory coordination mechanism resolves the conflict between the acquirer's contractual claim and the allottees' RERA rights.

Real estate M&A thus produces doctrinal conflicts between four statutory regimes on the

[8]SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (India), regs 13–14. Regulation 13 requires a public announcement upon acquisition of 25% or more of voting rights; regulation 14 specifies the open offer timeline, which is not extendable at the acquirer's discretion.

[9]Pioneer Urban Land & Infrastructure Ltd v Union of India (2019) 8 SCC 416. The Court upheld the constitutional validity of the IBC (Second Amendment) Act 2018 and confirmed that IBC and RERA claims may proceed concurrently.

[10]Companies Act 2013 (India), s 188(1), first proviso. The exemption removes the requirement for shareholder approval in respect of related-party transactions conducted between holding companies and their wholly-owned subsidiaries.

ISSN: 2582-6433

same transaction. The conflicts are structural: they arise from the design of the statutes, not from drafting errors or enforcement failures. No legal instrument governs the interaction between all four regimes simultaneously.

Joint Development Agreements: Conflict at the Corporate-Property Boundary:

The joint development agreement ('JDA') is the structural instrument through which real estate development in India is most commonly organised. Under a typical JDA, a landowner contributes land to a development enterprise and receives a proportion of the developed units or a cash consideration; a developer contributes development expertise, construction capital, and regulatory approvals, and retains the remaining developed units or cash proceeds. The JDA simultaneously attracts contract law, property law, stamp duty law, and — following the enactment of RERA — sector-specific regulatory obligations. The simultaneous application of these regimes to the same instrument, without a coordination mechanism, is the source of the doctrinal conflict examined in this section.

The characterisation of the JDA was considered by the Supreme Court in K Raheja Corp v State of Karnataka, in which the Court held that a JDA constitutes a works contract for stamp duty purposes where the developer enters into agreements to sell units in the proposed development before construction is complete.[11] The K Raheja Corp judgment confirms, at the level of Supreme Court authority, that the JDA creates legal relationships governed simultaneously by multiple statutory regimes. The unresolved question — which the Court did not address, and which no subsequent court has comprehensively resolved — is whether a JDA characterised as a works contract for stamp duty purposes is also a 'development agreement' for RERA purposes, requiring RERA registration as a project document. The same instrument may attract different characterisations under different statutory regimes, without any provision of any statute specifying which characterisation governs when regime characterisations conflict.

RERA imposes absolute delivery liability on the registered promoter. Under section 18 of RERA, if a promoter fails to complete or is unable to give possession of an apartment, plot, or building in accordance with the terms of the agreement for sale, the promoter is liable to return amounts received from the allottee with interest and compensation.[12] This liability is

[11]K Raheja Corp v State of Karnataka (2005) 5 SCC 162. The Court characterised a pre-construction sales agreement as a 'works contract' for stamp duty purposes. It did not address the multi-regime characterisation of the JDA; no subsequent decision has comprehensively resolved whether a works contract characterisation for stamp duty displaces a RERA development agreement characterisation.

[12]REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016, Section: 18

ISSN: 2582-6433

unconditional. RERA does not recognise contractor-caused delays, force majeure events, or — critically for present purposes — landowner default as an excuse for the developer's failure to deliver.

The JDA creates a structurally incompatible position. The developer's right of access to the development land is contingent on the landowner's continued performance of JDA obligations. If the landowner terminates the JDA — whether for developer breach, by exercise of contractual termination rights, or as a consequence of insolvency-related events — the developer loses access to the project land. But the developer's RERA obligations to allottees who have purchased units in the project do not terminate. Under section 18 of RERA, the developer remains liable for non-delivery regardless of the reason for non-delivery. RERA's absolute delivery liability and the JDA's contingent rights structure produce a gap in which the developer can be legally required to do something that the law itself has made structurally impossible.

RERA's definition of 'promoter' in section 2(zk) can extend to landowners who market and sell units in a proposed development, but its application depends on the facts of each case, and a landowner who exercises JDA termination rights is not, in the ordinary case, a registered promoter bearing RERA liability. The landowner's legal position under the JDA — a private commercial contract — allottees are not allowed to interfere with the legal status of the landowner under the JDA, which is a commercial contract between the two parties, privately. In the event that the JDA is cancelled by the landowner and the developer is denied access to the project land, three parties suffer: the developer who must pay the allottees the money which they cannot get because of non-delivery; the allottees who have paid to the developer to get the units; and the landowner who has no liability under RERA. The JDA dispute shows how the thesis is applied at the contract level: the project obligations of RERA and the JDA rights of the contract law interrelate on the same developer and lack of the coordination mechanism between them results in the harm that neither law is intended to solve.

Construction-Phase Risk: The RERA-EPC Absolute Liability Mismatch:

The RERA absolute delivery obligation interacts with the contractual risk allocation framework of the Engineering, Procurement and Construction ('EPC') contract during the construction phase of a real estate development project. The result of this interaction is a structural mismatch, which cannot be fixed at the level of writing the contract: the statutory liability of the developer to allottees is absolute, whereas the contractual rights of the developer against its contractor are subject to force majeure conditions, time extensions and the capped amount of

ISSN: 2582-6433

liquidated damages. It is a mismatch due to a design decision in RERA and not the poor contract drafting by the parties.

According to section 18 of RERA, the liability of the registered promoter to allottees in the delivery is absolute. There is no statutory defence of contractor-induced delay to the RERA claim of an allottee. A developer cannot use a force majeure event of a contractor as a partial defence to non-delivery. By way of contrast EPC contracts allocate delay risk in a variety of ways: extension of time provisions remove the liability of the contractor to liquidated damages in the event of a delay caused by events beyond its control; force majeure clauses relieve performance in the event of extreme supervening events; liquidated damages clauses limit the financial exposure of the contractor to delay. These contractual mechanisms also exist within a different legal register as compared to RERA statutory liability.

Nomination right is thus not only structurally reliant on shareholder co-operation, but also liable to removal at the board level, which is not limited by the SEBI Circular other than by the requirement of written reasons.

The interaction between RERA's absolute liability and EPC contract force majeure provisions was illuminated — though not directly resolved — by the Bombay High Court's decision in Standard Retail Pvt Ltd v G S Global Corp. The Court held that force majeure clauses in commercial contracts must specifically identify the supervening event to be effective; generic force majeure language does not excuse performance disrupted by COVID-19 supply chain failures.[13] Extracting the doctrinal principle: force majeure provisions are construed narrowly by Indian courts, and generic language confers significantly less protection than precise identification of protected events. What the decision left unresolved is the interaction between this narrow judicial interpretation and RERA's absolute delivery obligation. If EPC contractors cannot invoke broadly drafted force majeure provisions to excuse COVID-related construction disruption, and developers simultaneously cannot pass that disruption on to allottees under section 18 of RERA, the entire delay risk is absorbed by the developer regardless of the actual cause of the delay. No provision of RERA, the Companies Act 2013, or the EPC contract law framework addresses this three-party risk allocation problem.

The regulatory response to COVID-19 construction disruption — the extension of RERA project registration periods through administrative directions issued by state RERA authorities

[13]Standard Retail Pvt Ltd v G S Global Corp [2020] Bom HC; Halliburton Offshore Services Inc v Vedanta Ltd [2020] Del HC. Both decisions apply a narrow construction to force majeure clauses, requiring specific identification of the supervening event; generic language does not excuse performance disrupted by COVID-19 supply chain failures.

ISSN: 2582-6433

under section 7(3) of RERA[14] — provided temporary relief but did not resolve the underlying doctrinal mismatch. The COVID-19 scenario exposed the structural gap: RERA's absolute delivery liability regime was designed for a context in which delay risk could be distributed through contractual mechanisms, but RERA does not recognise those contractual mechanisms as defences to allottee claims. The construction-phase risk thus compounds: the developer bears RERA liability; the corporate governance framework is not configured to manage RERA risk at the project level; and the EPC contract framework does not provide a complete pass-through of the developer's statutory exposure. The developer stands at the intersection of three risk regimes without an instrument that addresses all three simultaneously.

- **Infrastructure Development SPVs: The Framework Extended:**

  The doctrinal incoherence identified in the preceding sections is not confined to residential real estate. The cases of Jaypee Infratech Limited ('JIL') and IL&FS Transportation Networks Limited demonstrate that the three-regime conflict between Companies Act governance, sector-specific regulatory obligations, and the IBC's insolvency resolution mechanism is a structural feature of the Indian regulatory framework for all large-scale infrastructure development conducted through SPV structures.[15]

  Both JIL and IL&FS Transportation Networks were Companies Act companies. Both held primary obligations under sector-specific regulatory frameworks: JIL held a concession agreement with the Yamuna Expressway Industrial Development Authority for construction of an expressway and concurrently operated a residential real estate project; IL&FS Transportation Networks operated highway concessions under National Highway Authority of India PPP frameworks. Both entities entered IBC CIRP proceedings in circumstances where the insolvency resolution mechanism was required to be applied to companies whose primary obligations were the completion of physical infrastructure projects under regulatory frameworks that the IBC was not designed to coordinate.

  The proceedings in Jaypee Kensington Boulevard Apartments Welfare Assn v NBCC (India) Ltd (2021) 13 SCC 182 — arising from the Jaypee Infratech insolvency initiated

[14]RERA, S:7(3); Ministry of Housing and Urban Affairs, Office Memorandum F No O-17034/10/2020-H (13 May 2020), directing state RERA authorities to treat COVID-19 as a force majeure event and extend project registration periods. The administrative extension did not modify the substantive liability framework under S:18.

[15]Re Jaypee Infratech Ltd (2017) NCLT Allahabad, CP No IB-77/ALD/2017, admitted 9 August 2017; Jaypee Kensington Boulevard Apartments Welfare Assn v NBCC (India) Ltd (2021) 13 SCC 182. The Supreme Court in the latter decision confirmed that an NCLT order approving a resolution plan involving a government concession does not, by itself, transfer the concession; counter-party consent remains a condition precedent to effective transfer.

ISSN: 2582-6433

in August 2017 — generated a doctrinal principle of considerable significance for the understanding of the IBC's structural limitations in the infrastructure context. The IBC's CIRP assumes that a resolution plan can be implemented through the exercise of corporate rights: the resolution applicant acquires the corporate debtor's shares or assets and continues or reconstructs its business. Where the corporate debtor's primary asset is a concession or PPP agreement, this assumption confronts a structural obstacle: the concession is a contract with a government counter-party, the transfer of which requires counter-party consent. The IBC cannot compel government consent to a concession transfer.[16] An NCLT order approving a resolution plan that involves the transfer of a concession does not, by itself, transfer the concession.

The NCLT and NCLAT have reached inconsistent conclusions across different infrastructure insolvency proceedings on the question of whether a resolution professional can bind the government counter-party to a concession agreement through the NCLT's approval of a resolution plan, or whether such binding requires the counter-party's express consent as a condition precedent to plan implementation.[17] The absence of a clear doctrinal resolution of this question represents a significant source of legal risk for resolution applicants in infrastructure insolvency proceedings, and for the creditors of infrastructure SPVs who rely on the IBC as their primary recovery mechanism. Both interpretations — that the resolution plan binds the counter-party, and that it does not — produce significant adverse consequences for different classes of stakeholder.

The IL&FS proceedings added a further dimension. The IL&FS group's complex structure — comprising multiple SPVs each holding discrete concession obligations, cross-collateralised through group-level guarantees — confronted the IBC's single-entity CIRP framework with a network of interlocking liabilities that the framework could not resolve without significant modification. The National Company Law Tribunal's approval of a government-supervised restructuring framework for the IL&FS group, departing from the standard CIRP mechanism,[18] was a pragmatic response to the doctrinal limits of the IBC

[16]IBC, ss 30–31. Section 31 requires NCLT satisfaction that the plan meets s 30(2) requirements; the Code does not contemplate a requirement for counter-party government consent to asset transfers within the plan approval mechanism.

[17]Essar Steel India Ltd v Satish Kumar Gupta (2020) 8 SCC 531. The Supreme Court addressed the scope of NCLT powers in approving resolution plans but did not specifically resolve the concession transfer consent question; NCLT and NCLAT benches have reached inconsistent conclusions across different infrastructure insolvency matters.

[18]Union of India v IL&FS Ltd (2018) NCLAT; IL&FS Transportation Networks Ltd v National Highways Authority of India (2018) SC. The IL&FS group restructuring involved a government-supervised framework approved by NCLAT, departing from the standard CIRP mechanism.

ISSN: 2582-6433

in the group insolvency context. It demonstrated that the three-regime doctrinal incoherence identified in this dissertation — between corporate law, sector-specific regulatory obligations, and the IBC — is a general structural feature of large-scale infrastructure SPV structures in India, not a product of RERA's specific drafting choices.

- **Exit, Insolvency, and the IBC-RERA Doctrinal Conflict:**

  Insolvency is the stage at which the doctrinal conflicts examined throughout this paper converge simultaneously on the same legal entity. The IBC-RERA moratorium conflict, the Pioneer creditor duality problem, and the preferential transaction-RERA project completion tension all operate concurrently on the insolvent real estate developer. No statutory coordination mechanism addresses their simultaneous operation. The insolvency stage is, accordingly, the site at which the inadequacy of the legal risk management framework is most consequential and most fully demonstrated.

  The Supreme Court's judgment in Pioneer Urban Land & Infrastructure Ltd v Union of India[19] established the foundational doctrinal principle for understanding the position of homebuyers in real estate insolvency. The Court held that homebuyers who have paid advance consideration for undelivered flats qualify as financial creditors under section 5(8)(f) of the IBC, on the ground that their advance payment has the commercial effect of a borrowing and thus constitutes financial debt.[20] This recognition was a significant development: it elevated homebuyers from the position of ordinary creditors — who could pursue RERA remedies in parallel with insolvency proceedings — to financial creditors entitled to participate in the Committee of Creditors ('CoC') and influence the resolution plan. The judgment upheld the constitutional validity of the Insolvency and Bankruptcy Code (Second Amendment) Act 2018, which had introduced this classification.

  The Pioneer judgment, however, created a creditor class whose claim is simultaneously monetary and non-monetary. The IBC's resolution framework is designed for monetary claims: resolution plans offer creditors a return on their admitted claims, expressed as a percentage of the principal debt. A homebuyer who has paid for an undelivered flat has a claim that is, in its substance, non-monetary: the homebuyer wants the flat, not a partial refund. A resolution plan that offers monetary compensation satisfies the financial creditor's monetary claim but does not satisfy the non-monetary claim for physical

[20]Pioneer (n 10); IBC, s 5(8)(f), as inserted and clarified by the Insolvency and Bankruptcy Code (Second Amendment) Act 2018. The Court held in Pioneer that amounts raised from allottees have the commercial effect of a borrowing, constituting financial debt.

ISSN: 2582-6433

delivery. A resolution plan that offers physical delivery — by requiring the resolution applicant to complete the project — may or may not be financially viable, depending on project completion status and the resolution applicant's capital. The Court did not articulate a principle for resolving this duality. Post-Pioneer, the CoC in every major real estate CIRP has confronted the incompatibility between homebuyer-creditors' monetary and physical claims, frequently producing gridlock in the resolution process.[21]

The IBC-RERA moratorium conflict creates a second unresolved dimension. Section 14 of the IBC imposes a moratorium on all proceedings against the corporate debtor upon admission of the CIRP application. Section 79 of RERA grants the RERA authority exclusive jurisdiction over disputes between allottees and promoters. The NCLAT has held in multiple decisions that the section 14 moratorium does not bar the RERA authority from proceeding against a developer in CIRP.[22] If this holding is correct, then section 238 of the IBC — which makes the Code's provisions prevail over any inconsistent law — does not apply to RERA allottee proceedings, confirming this dissertation's thesis that section 238 does not resolve IBC-RERA conflicts. If the holding is incorrect, then RERA's exclusive jurisdiction is suspended during CIRP, leaving allottees without a forum to enforce delivery obligations during the most critical period of the project's legal history.

Both of these interpretations cause serious damage to allottees; no judicial pronouncement of high authority has been found which is doctrinally right or which is not.[23]

The ruling of the Supreme Court in Anuj Jain IRP v Axis Bank Ltd has added a third aspect of doctrinal conflict during the insolvency stage.[24] The Court upheld that the security interests which have been created by the company in the IBC preferential transaction look-back period would be avoided under section 43 even in cases where the security was created to fund a RERA-registered project which the developer was legally liable to deliver.[25] The decision made with respect to the avoidance clause provided that it was to operate as a deemed provision; that is, where the statutory conditions had been fulfilled, the arrangement will be deemed to have been done prior to the time set aside for its avoidance. This has a doctrinal implication on the real estate sector: a lender who secures

[21]Bikram Chatterji v Union of India (2019) 19 SCC 161. In the Amrapali proceedings, the Supreme Court invoked Article 142 of the Constitution to fashion relief for over 42,000 homebuyers because the CoC-led CIRP process could not adequately address non-monetary allottee claims.

[22]Flat Buyers Association Winter Hills-77 v Umang Realtech Pvt Ltd (2019) NCLAT, Company Appeal (AT) (Ins) No 926 of 2019. The NCLAT held that RERA proceedings are not 'proceedings' within the meaning of IBC s 14(1)(a) and are not stayed by the moratorium.

[23] IBC, S: 14, 238; RERA:- S:79,Section 238

[24] Anuj Jain IRP v Axis Bank Ltd (2020) 8 SCC 481, 2020

[25] IBC: S:43(2), (4),Section 43(2), S:43(4), SS: 4(2)(l)(D).

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a project registered under RERA to finance its construction, so that the developer can fulfil the completion requirement that RERA places on him, may discover that such security is void in section 43 in the event that the developer later falls into CIRP during the look-back period. Security granted to allow compliance with RERA is voidable exactly on the basis that the developer did not observe RERA compliance and he went into insolvency. This is a structural disincentive to funding of the RERA-registered projects which will straight jeopardize the project completion mandate of RERA. The legislative response to the doctrinal conflict between the pro-completion policy of RERA on the one hand and the anti-preference mechanism of the IBC on the other has not been undertaken.

Another conflict is at the intersection of the IBC mechanism of authorization of the resolution plan and RERA requirement of project completion. Section 30(2)(e) of the IBC stipulates that a resolution plan shall not be against any clause of any law in effect at the time.[26] This has been taken to refer to the fact that real estate CIRP proceedings require that resolution plans should be in line with RERA. Practically, this presents a serious conflict to be resolved by the applicants of plans: a plan that meets the CoC commercial needs - which will often require a financial reward to financial creditors - might not, at the same time, be able to meet the RERA project completion and allottee protection requirements in the same plan structure. In case the two groups of requirements are not simultaneously satisfied, then the resolution process might fail, leaving liquidation as the left-over product - the product which, ex ante, is most destructive to allottees. All three aspects of the three regime doctrinal conflict are brought to a head at the same time on the insolvent real estate developer: between the Companies Act, the RERA, and the IBC. They are all simultaneous, with no statutory coordination mechanism, and include the moratorium conflict, the Pioneer creditor duality, the tension between preferential transaction-completion financing, and the compliance requirement as to the resolution plan.

[26] [26]IBC, s 30(2)(e). The sub-clause requires that a resolution plan not contravene any provision of law in force. Insolvency Law Committee, Report (March 2018) 47, noting that resolution plans in real estate CIRPs must be RERA-compliant.