

# Law and Practice

## Authors

**AZB & Partners** has a real estate practice known for assisting its clients in their merger, acquisition, JV, financing, private credit, capital market, REITs, asset monetisation and joint development agreements across all asset classes including commercial, industrial, retail, data centres and residential real estate. Leading various real estate insolvencies and foreclosure matters, the firm (i) advises resolution applicants on their resolution plans to acquire real estate companies/projects going through the corporate insolvency resolution process under the Insolvency and Bankruptcy Code; and (ii) advises banks/financial institutions on the foreclosure of mortgaged land parcels and real estate projects. AZB & Partners also regularly advises central and state governments on the drafting of laws and regulations around real estate development and on several other policy matters. The driving principle for the real estate practice at the firm is to present the client with an integrated outlook on a particular transaction and equip them to make an informed decision.

**Hardeep Sachdeva** is a leading real estate lawyer in India, with the unique combination of being a renowned corporate M&A lawyer with in-depth real estate domain knowledge and experience. He leads large/complex transactions all over the country. At the forefront of the intersection of real estate and insolvency practice in India, Hardeep regularly advises: (i) on acquisition of real estate companies/projects undergoing insolvency resolution; and (ii) banks/financial institutions on foreclosure of mortgaged land parcels and real estate projects. He has also authored several publications and has been instrumental in landmark judgments and jurisprudence in India for real estate and IBC matters.

**Abhyudai Singh** has over 18 years of experience and specialises in real estate dispute resolution. He has extensively advised lenders, corporate conglomerates, landowners, tenants and shopping establishments as well as service providers in strategising and structuring in relation to real estate regulation, RERA compliances, special economic zone regulations and dispute resolution. Additionally, Abhyudai advises clients on several M&A, general corporate, employment, banking and finance, restructuring and insolvency, real estate, and power and infrastructure matters. He represents his clients in

various fora in India, including the Supreme Court, High Courts, District Courts and the National Green Tribunal.

**Swati Sharma** has over 12 years of work experience, with extensive experience specialising in handling various complex commercial litigations, arbitration, matters pertaining to insolvency and restructuring. She also has expertise in banking and finance dispute resolution, more specifically in handling matters relating to securitisation and debt recovery. Swati represents leading banks, financial institutions, real estate and infrastructure giants, multinational companies and asset reconstruction companies before varied courts, judicial fora and tribunals in India. She advises various real estate clients regarding tenant disputes, inter alia, in relation to recovery proceedings, arbitration proceedings relating to construction obligation disputes etc and on various insolvency matters.

## **1 Landlord-Tenant Disputes**

### **1.1 Access**

#### **1.1.1 Remedies for Landlords Denied Access for Repairs**

The landlord has a statutory right to enter into the premises, after prior notice to the tenant, at reasonable times during the term of the lease and to inspect the premises. Where the repairs are warranted due to the conduct of the tenant, the landlord is required to give notice to the tenant regarding the defects, which the tenant is bound to make good in the period prescribed under the statute. The landlord also has the right to have normal wear and tear repaired. Typically, minor repairs are the responsibility of the tenant, while any major repairs, especially those that are not attributable to the tenant, have to be carried out by the landlord and the landlord can seek assistance from the court for grant of an injunction, to carry out such repairs that are necessary to preserve the property. Where the tenant refuses access to the landlord, the landlord will be required to approach the jurisdictional court/arbitral tribunal, as the case may be, seeking interim relief.

#### **1.1.2 Emergency Access**

In emergency situations, the landlord must seek intervention from the jurisdictional court/regulator for an injunction/direction to the tenant to grant the landlord and the workers access to the premises to carry out the repairs. The landlord in such an application must set out the nature of the emergency. In most cases, the courts, if satisfied that the need is bona fide and urgent, will grant access to the landlord. However, if the nature of the emergency is such that it could pose a threat to the safety of the public at large or other tenants, then the landlord may take immediate remedial action with the assistance of the police.

### **1.1.3 Impact on Neighbours**

Where a tenant's failure to provide access to the landlord impedes the use of other tenants, the other tenants may approach the court for relief by way of an injunction. The rights of access of other tenants are also protected by the Indian Easements Act, 1882.

## **1.2 Harassment**

### **1.2.1 Landlord Harassment**

Several states in India have enacted laws to protect the rights of tenants. While these legislations are usually to protect the poorer section of society and subject to monetary limits in terms of the rent, even the general law, that is, the Transfer of Property Act, 1882, provides statutory safeguards against eviction or interference by the landlord/lessor. Forceful eviction or impediment of tenancy rights is not permissible under law.

Tenants have rights to approach the court for relief by way of grant of injunctions against the landlord under the applicable civil laws, to prevent the landlord attempting to frustrate or impede their tenancy:

- Transfer of Property Act, 1882;
- Indian Easements Act, 1882;
- Specific Relief Act, 1963 read with the Code of Civil Procedure, 1908; and
- under state enacted laws (as applicable) such as rent control legislations.

Further, if the nature of the landlord's conduct is severe enough to cause a threat to the life and property of the tenant, the tenant can also approach the

local police authorities for immediate intervention and initiate criminal proceedings against the landlord under the Bhartiya Nyaya Sanhita, 2023. It is relevant to note that civil and criminal proceedings can be commenced simultaneously.

### **1.2.2 Impact of Unit Status**

Typically, if the unit is covered under special statutes, which are usually to protect the tenant, such as rent control laws (which vary from state to state), these may entail special conditions being imposed on the landlord. The proceedings may be restricted to specific courts, which may override any contractual arrangements. For instance, in the state of Maharashtra, the Presidency Small Causes Court Act, 1882 grants jurisdiction to small causes courts in relation to eviction of the occupant of premises, and no other court/tribunal has jurisdiction to deal with the said cause.

### **1.2.3 Consequences of a Regulatory Finding of Landlord Harassment**

A determination regarding harassment of a tenant by an agency or a regulator (such as the police or a regulatory authority) may lead to orders/injunctions against such landlord, which may include directions to make monetary compensation to the tenant and/or injunctive orders restraining the landlord from interfering with the tenant's possession and peaceful use of the leased premises, and such other further orders/directions to safeguard the interests of the tenant.

Further, in appropriate cases, the tenant may also institute suitable criminal proceedings by approaching the police authorities, in order to safeguard his life and property.

## **1.3 Rent Stabilisation/Regulation**

### **1.3.1 Statutory Tenancies: Types and Differences**

Different states also have state-specific legislations for statutory tenancies. The state-specific legislations regulate rent levels, provide security of tenure, and set out the rights and obligations of tenants and landlords. For example:

- Maharashtra Rent Control Act, 1999;
- Delhi Rent Control Act, 1958; and

- Tamil Nadu Buildings (Lease and Rent Control) Act, 1960.

The Model Tenancy Act, 2021 (MTA) was introduced by the government of India for adoption in future tenancies by way of enacting fresh legislation or suitably amending existing rental laws. The aim of the MTA is to balance the rights and interests of landlords and tenants alike. The MTA establishes a rent authority, rent court and rent tribunal. It provides guidelines for security deposits, rent agreements and eviction processes.

The government of India did invite suggestions from all states and union territories while preparing the MTA; however, states have yet to adopt the MTA in their respective state legislations.

### **1.3.2 Exceptions to Renewing a Statutory Tenancy**

The law in India recognises statutory tenancy where there is the absence of a contract, local law or usage to the contrary. For instance, under the provisions of the Transfer of Property Act, 1882, a lease of an immovable property for agricultural or manufacturing purposes is deemed to be a lease from year to year, terminable, on the part of the landlord or tenant, by six months' notice, while a lease of an immovable property for other purposes is deemed to be a lease from month to month, terminable, on the part of the tenant or landlord, by 15 days' notice.

### **1.3.3 Converting a Statutory Tenancy to a Free Market Unit**

A statutory tenant can be converted to a free market tenant (i) for properties governed by the rent control laws, when the rent exceeds the stipulated threshold and/or when the property is reconstructed, and (ii) where parties agree to determine their rights and responsibilities, which are reduced into writing. Furthermore, the tenant may by execution of a rent/lease agreement governed by the provisions of the Indian Contract Act, 1872 and the Transfer of Property Act, 1882 become a free market tenant. Where the immovable property is sought to be let out for a period exceeding 11 months, registration of the rent/lease agreement is mandatory under the provisions of the Registration Act, 1908.

### **1.3.4 Regulatory Oversight of Statutory Tenancies**

There are no specific regulatory agencies that regulate statutory tenancies. Such tenancies are month to month or year to year, as the case may be. All disputes in relation to the said tenancies are adjudicated by the courts of competent jurisdiction.

## **1.4 Injunctive Relief in Lease Disputes**

### **1.4.1 Injunctive Remedies for Tenants Facing Insufficient Cure Periods**

The remedies of a commercial tenant are as set out in the lease/rent agreement. Generally, a lease/rent agreement sets out the period within which defaults are to be cured. Where the tenant is unable to cure the defaults, they can request the landlord to grant extension regarding such a period. However, a landlord is not under an obligation to accede to such a request and, in such a scenario, the tenant may have to seek injunctive relief from the court. The tenant would be obligated to lead evidence to establish that they have taken prompt steps towards curing such defaults as well as the reasons due to which the tenant is unable to cure the defaults within such prescribed cure period.

The nature of evidence required may depend on the nature of the default. For instance, if the tenant has not carried out certain maintenance works falling within their scope and, post notice from the landlord, they are unable to carry out such works due to holidays or restrictions, they may need to prove that there was a shortage of labour.

### **1.4.2 Impact of Failing to Obtain an Injunction and Alternative Options**

Even when a tenant fails to obtain an injunctive relief, laws in India protect tenants to the extent that a tenant cannot be evicted forcefully without following due process of law.

### **1.4.3 Landlord Bad Faith**

The rights of a tenant are recognised under the Transfer of Property Act, 1882 amongst other applicable laws, and if any bad faith action is taken by the landlord, the tenant can initiate appropriate legal proceedings against the landlord, which may differ depending upon the applicable legislations and forums. It has been affirmed, for instance, in rent/lease agreements where there is no arbitration clause, that the courts of competent jurisdiction will have to be approached for interim/injunctive reliefs. Similarly, in cases where the dispute resolution mechanism includes an arbitration clause, the tenant may approach the court/arbitral tribunal, as the case may be, for interim reliefs.

## **1.5 Guarantees in Landlord-Tenant Context**

### **1.5.1 Types of Guarantees in Tenancies**

In India, rent/lease agreements are not typically coupled with any guarantee/obligation by third parties regarding obligations of the tenant. Typically, lease dues are regarded as an “operational debt” and not a financial debt, unless the lease is in the nature of a financial lease. In certain cases, usually large commercial tenancies, there may be some instances of guarantees being furnished on behalf of the tenant by the parent entity, affiliate or promoter.

### **1.5.2 Revocation of Guarantees**

As noted in **1.5.1 Types of Guarantees in Tenancies**, guarantees are not typically issued by the tenant in India for lease transactions. However, in the event there is a guarantee in relation to a commercial tenancy, then, depending on the nature of the lease (whether it is a financial lease or an operational lease) and the wording of the guarantee, the debt owed by the guarantor may constitute a financial or an operational debt. In such cases, in addition to the right to seek enforcement, payment or performance of obligations by the guarantor through arbitration proceedings or through the court (depending on the jurisdiction clause), the landlord may also be able to initiate proceedings under the provisions of the Insolvency and Bankruptcy Code, 2016 where the tenant and/or the guarantor (as the case may be) is a company or a limited liability partnership, debt/outstanding dues are more than INR10 million and there is no pre-existing dispute between the parties in relation to such dues.

### **1.5.3 Expedited Recovery**

As noted As noted in **1.5.1 Types of Guarantees in Tenancies**, guarantees are not typically issued by the tenant in India for lease transactions. However, the creditor can seek interim directions from the court, for deposit of the amount due (or a part thereof) by the guarantor. In order to succeed in securing such directions, the creditor will have to satisfy the court of their necessity, such as the likelihood of the tenant/guarantor fleeing or dissipating their assets in a manner that, if the creditor were to succeed, the decree/award would be rendered a mere paper decree.

## **2 Foreclosure Actions**

### **2.1 Foreclosure Process**

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the “SARFAESI Act”) regulates securitisation of immovable property and reconstruction of financial assets and enforcement of security interest. The process of enforcement of security interests under the SARFAESI Act entails minimal intervention of the courts/tribunals, and the lender can take possession (actual, physical or symbolic possession) and sell the asset, including by way of an auction process. Alternatively, the lender can simply sell its debt to an asset reconstruction company, which would step into the shoes of such lender. In such a scenario, there is no judicial intervention and the lender and the asset reconstruction company are only required to comply with the statutory stipulations. The borrower has limited rights/limited grounds to approach the debts recovery tribunal, if the borrower is aggrieved by measures undertaken by the lender. It is relevant to point out that the SARFAESI Act is applicable only in cases of “secured creditors” as defined under the Act and does not apply to private individuals.

Other than under the SARFAESI Act, the lender/creditor can also initiate proceedings for commencement of the corporate insolvency resolution process against the tenant/debtor, where the debtor is a company or a limited liability partnership, the dues are in excess of INR10 million and there is no pre-existing dispute regarding such dues (see **1.5.2 Revocation of Guarantees**).

## 2.2 Foreclosing on Pledged Equity

If there is a pledge of shares, then, as per the provisions of the pledge agreement, the pledge can be invoked/enforced. Usually, there is no judicial intervention and the process simply entails issuance of a notice invoking the pledge. Additionally, since most securities are now maintained in electronic form, such notice can be given to the depository participant (who would also be apprised of the share pledge and the invocation of the pledge by the lender). While such process is not judicial, there are times when the property owner or pledgor may approach the court to stall or prevent invocation of the pledge. In such cases, the lender would have to defend the proceedings.

## 2.3 Notice Requirements for Non-Judicial Foreclosures

Under the SARFAESI Act, a secured creditor is required to give 60 days’ notice to the borrower before enforcing security interest against immovable property. However, there is no specified time period for foreclosure.



## **2.4 Borrower's Rights of Redemption in Foreclosure**

The borrower has a right to redeem upon payment of all dues together with all interest accrued, costs, charges and expenses incurred to the secured creditor, at any time before issuance of a sale notice.

## **2.5 Pursuing Claims Against Borrowers and Foreclosure Simultaneously**

Depending on the wording of the agreements/contract, typically, simultaneous proceedings for claims and foreclosure can be pursued by lenders, provided there is no excessive/unjust enrichment to the lender.

## **2.6 Foreclosure Timelines**

Judicial foreclosure does not necessarily come with a stipulated timeline. As mentioned in **2.2 Foreclosing on Pledged Equity**, the process of foreclosure generally does not entail judicial intervention. However, there are instances where a borrower, pledger or property owner can approach the courts with the intention of stalling the process of foreclosure.

## **2.7 Remedies for Deficiency After Foreclosure**

In the event of a deficiency in foreclosure, the lender has the remedy to file for recovery action before the appropriate court of law.

# **3 Joint Venture Disputes**

## **3.1 Common Joint Venture Entity Types and Partner Requirements**

The most commonly used entities for facilitating joint ventures in real estate are companies (usually incorporated as a special purpose vehicle for a specific project) under the Companies Act, 2013 or a Limited Liability Partnership constituted under the Limited Liability Partnership Act, 2008. The choice depends on specific objectives, tax considerations and regulatory compliance.

Joint venture agreements and operating agreements in real estate transactions require co-operation between the partners to ensure the smooth execution and success of the project. These agreements typically include a shareholder agreement, which contains the contractual rights, duties and obligations of the parties, including how the parties will collaborate, allocate responsibilities, and share profits and liabilities.

### **3.2 Joint Venture Duties and Remedies for Violation**

Persons with ownership interests in real estate joint ventures have contractual and statutory obligations to:

- act in good faith;
- exercise care;
- disclose relevant information; and
- comply with legal obligations.

Non-compliance or breach of these duties can result in statutory consequences, which may entail:

- monetary penalties;
- civil and/or criminal proceedings;
- cancellation of licences; and/or
- disqualification from conducting business activities for a specified period (in cases of certain violations of statutory requirements).

If an owner breaches any of these duties, the affected party has various legal remedies, including contractual enforcement through legal proceedings; in case of breach of statutory duties, complaints can be made to the relevant/jurisdictional statutory authority, which may impose penalties and commence proceedings to procure compliance. Furthermore, there may be litigation proceedings, which may be commenced by any of the stakeholders to procure compliance. The nature of actions/remedies may depend on the nature of the violation.

### **3.3 Joint Venture Management Disputes**

If an organisation's governing documents are silent, vague or result in a deadlock, resolution may be made through: (i) proceedings applicable to the entity (Companies Act, 2013, Limited Liability Partnership Act, 2008, Indian Partnership Act, 1932); or (ii) alternatively through dispute resolution processes.

Further, for joint ventures undertaken through regulated real estate investment entities, such as REITs, governance mechanisms, including for

decision-making and for resolution of deadlock matters, may be prescribed in the governing regulations (such as the REIT Regulations).

Practical business solutions, such as buyouts, tie-breaker votes or auction methods, are also among other options, which are used to break such deadlocks.

### **3.4 Enforceability of Automatic Judgment Provisions and Provisional**

Provisions allowing automatic entry of judgment upon an event occurring are rare in India. Courts apply the principles of natural justice, and any waiver/deprivation of the right to be heard is likely to be struck down as against public policy and natural justice. Usually such reliefs are granted as interim injunctions to preserve the subject matter of the dispute/proceedings until the other party has been heard.

Briefly, under Indian laws, courts consider factors such as prima facie case, irreparable harm, balance of convenience and good faith and equity, while granting interim reliefs such as temporary injunctions. Even in arbitration agreements, interim relief must be sought from a court or tribunal (as the case may be), and no contractual provision can mandate an automatic injunction.

### **3.5 Winding Down Joint Ventures**

Winding down a joint venture in India requires careful planning, compliance with legal and tax regulations, and settlement of financial and contractual obligations. A well-drafted Joint Venture Agreement with clear exit provisions can simplify this process. A structured approach ensures that liabilities are addressed, assets are distributed properly, and legal disputes are minimised. Winding up of a joint venture company or LLP can be made voluntarily under the Companies Act, 2013 or the LLP Act, 2008 as per the prescribed process with minimal judicial intervention. However, in cases where there are significant debts which the company or LLP is unable to meet, such entity may have to file for insolvency under the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal or the Debt Recovery Tribunal, as the case may be.

## **4 Guarantor Liability**

### **4.1 Types of Guarantees**

In Indian real estate transactions, various types of guarantees are commonly used, depending on:

- the nature of the project;
- financing structure; and
- contractual obligations, including indemnification obligations.

The most frequently encountered guarantees include, inter alia:

- personal and corporate guarantees;
- performance-related guarantees;
- bank and financial guarantees; and
- landowner and investor guarantees.

### **4.2 Non-Recourse Carve-Out Guarantees**

In Indian real estate financing, non-recourse loans are relatively uncommon, as lenders prefer full-recourse structures, with securitisation over all assets, immovable and movable properties, including any future cash flows and assets. Furthermore, corporate and personal guarantees of the promoters are also obtained to prevent any misuse or misappropriation of funds.

### **4.3 Guarantee Enforceability**

The wording of guarantees is important in case of enforcement. Typically, a guarantee should be unconditional and irrevocable for ease of enforcement and the obligations, triggers and remedies should be clear and unambiguous. Furthermore, while guarantees are binding, instances of egregious fraud or special equities, or where irretrievable injustice would ensue were invocation not to be enjoined, may limit enforcement of guarantees.

Waivers of defences are enforceable unless they violate statutory rights, public policy or fundamental contractual principles. The enforceability of waivers depends on the facts of each matter, applicable statute and precedents set by the courts of law.

## **4.4 Expedited Judicial Procedures and Statutory Limitations**

India offers several expedited judicial mechanisms for enforcing guarantees, particularly in the financial and commercial sectors. These procedures help lenders, investors and financial institutions recover their dues efficiently. The key mechanisms include:

- Summary Suit under Order XXXVII, CPC (1908) – for faster money recovery (in a summary manner where the debt or liability is admitted);
- Commercial Courts Act, 2015 – for a speedier litigation process in case of “commercial disputes” as defined under the Commercial Courts Act, 2015;
- Insolvency and Bankruptcy Code, 2016 – in case of debt and default by a corporate person, ie, a company or an LLP (and individual promoters), where there is a financial or an admitted/undisputed operational debt of more than INR10 million and default/inability to pay; and
- Arbitration and Conciliation Act, 1996 – if the guarantee contains an arbitration clause.

Lenders may, in certain cases, exercise their statutory and contractual rights simultaneously to enforce a guarantee for recovering the underlying obligation. However, this is subject to certain statutory rules and judicial precedents that govern:

- double recovery/prevent unjust enrichment;
- election of remedies; and
- procedural limitations.

## **5 Other Issues Arising in Distressed Situations**

### **5.1 Receivers**

#### **5.1.1 Appointment of Receivers**

The appointment of a receiver is made through a court or tribunal under the provisions of the Code of Civil Procedure, 1908 or under the Transfer of Property Act, 1882 or other statutes which provide for the appointment of receivers. The appointment may differ under different legal frameworks and

depending on the facts and circumstances of the matter. For instance, under the Act, while taking possession of the mortgaged asset, the secured creditor applies to court by way of an application seeking assistance of a court-appointed receiver (which may be a lawyer who appears regularly before the court and is familiar with the statutory process and procedures). Under the insolvency laws, a resolution professional is appointed by the tribunal, takes over all the assets and management of the corporate debtor/borrower and is obligated to keep it as a going concern during the insolvency resolution or liquidation process. Resolution professionals are persons or entities subject to certain qualifications and registered with the statutory authority for insolvency matters (Insolvency and Bankruptcy Board of India).

Asset reconstruction companies and other non-banking financial institutions may also take over the distressed assets. These entities are additionally governed by the regulations/directions issued by the Reserve Bank of India from time to time.

### **5.1.2 Common Scenarios for Receivership Appointment**

Receivers are appointed by courts to take over distressed assets, where such assets need to be preserved so that they are not frittered away, or destroyed, damaged or rendered useless. Requirements may differ according to the particular facts and under different legal frameworks. For instance, under the SARFAESI Act, while taking possession of the mortgaged asset, the secured creditor applies to court by way of an application seeking assistance of a court-appointed receiver (which in most cases is a lawyer who may be regularly appearing before the court).

Under the insolvency laws, a resolution professional is appointed by the tribunal and takes over the management of all assets of the borrower. Resolution professionals are persons or entities registered with the Insolvency and Bankruptcy Board of India.

## **5.2 Real Estate Bankruptcies**

### **5.2.1 Requirements for Single Asset Bankruptcy**

Any entity being a company or an LLP (or individual guarantor(s)) that has defaulted in payment obligations (including guaranteed obligations), where

the debt due is over the amount of INR10 million, can be taken to insolvency/bankruptcy by the creditor. The aim and objective of the insolvency laws in India is to ensure that insolvency is resolved and that the creditors receive maximum benefit by transferring the entity as a going concern; however, in situations where the said result is not achieved, due to the lack of resolution applicants/bidders or too low a bid, the entity is then ordered to be liquidated.

### **5.2.2 Impact of Bankruptcy Filing**

After the filing of an application/petition for initiation of insolvency, when such an application is admitted by the tribunal, the insolvency resolution process is commenced and a moratorium is imposed, pursuant to which all litigation proceedings, actions or remedies for recovering monies, enforcement of security interest and foreclosure are suspended.

Please note that the moratorium is operative only against the entity and the assets of the entity against which the insolvency resolution process has commenced. Action against any personal or corporate guarantor is not stayed, and the lender has the ability and right to initiate appropriate legal action against such guarantors.

## **6 Arbitration**

### **6.1 Prevalence of Arbitration Clauses**

Arbitration clauses are quite prevalent in real estate transactions in India. Agreements, inter alia, including lease agreements and joint development agreements generally have arbitration clauses as the dispute resolution mechanism. This is also due to the fact that a civil suit would entail a higher incidence of court fees, which would have to be paid by the party instituting the suit/proceedings. Further, arbitration proceedings may be faster as compared to court proceedings since most courts in India have a large number of cases to be heard daily.

### **6.2 Arbitration or Litigation?**

Apart from the incidence of court fees, which is ad valorem based on the amount claimed by the plaintiff, arbitration is a time-bound process; on the other hand, general litigation is a time-consuming process (where chances of prolongation are relatively higher due to the high number of cases being heard

by courts). Further, arbitration is a more confidential process, and the documents/orders are only available to the parties/arbitral tribunal, while court orders (in litigation) are available on court websites, which are accessible to the public at large. In some instances, the overall cost of arbitration may be quite high; however, this is usually shared by the parties.

In arbitration, the arbitral award is binding, and the parties have little recourse to challenge the award (as the scope of challenge under the Arbitration Act is narrow/limited) and the challenge must be made within a specific time limit, failing which the award becomes final and binding. In appropriate cases, the court may set aside the whole award or part of the award (where it is severable). However, the question of whether a court hearing an appeal against an arbitral award can modify the arbitral award is pending before the Supreme Court of India. In litigation, the grounds for appeal are quite wide and there are more relaxations as to the grounds and production of evidence.

### **6.3 Prevalence of Mediation**

The Mediation Act, 2023 (the “Mediation Act”) has been promulgated with an objective to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, and to enforce mediated settlement agreements. It is pertinent to mention that only a few of the provisions of the Mediation Act have been notified so far. The Mediation Act applies to parties within India and/or where there is an international mediation (ie, where any party is a resident of/has their place of business outside India).

Settlement through mediation has always been promoted and endeavours in that regard have been made in India; however, the process has never been made mandatory (except under the Commercial Courts Act – for disputes of a commercial nature of specified value). Even in situations where the dispute resolution process has been agreed to include “mediation” before referring the same to arbitration or a court process, the courts have held that, in appropriate cases, the parties are not bound to mediate and can directly initiate arbitration or appropriate court proceedings.

## **7 Provisional Remedies**



## **7.1 Types of Provisional Remedies in Real Estate Disputes**

Some statutory remedies under the Transfer of Property Act, 1882, the Indian Easements Act, 1882, as well as under the tenancy legislations, provide for provisional remedies. Furthermore, the affected party can also seek an interim or temporary injunction from the court for protection of rights or remedies pending proceedings. In cases where a property is mortgaged to a secured creditor, the secured creditor can initiate action under the SARFAESI Act for enforcing its rights on the security interest or mortgaged asset. In any event, the borrower is not permitted to sell or encumber a mortgaged asset. In so far as property which is not mortgaged is concerned, the creditor has various remedies, inter alia, including obtaining interim reliefs under civil or arbitration law. Separately, the creditor can also take steps to initiate insolvency proceedings against a borrower. Once insolvency proceedings commence, the borrower is debarred from dealing with, encumbering or alienating any of its properties (both movable and immovable).

## **7.2 Requirements for Obtaining a Provisional Remedy**

The party seeking the provisional remedy must make out a prima facie case in its favour, based on the statutory provisions (where available), otherwise, equity, likelihood of irreparable harm, injustice and balance of convenience. Injunctive/prohibition orders can only be passed by a competent court of law or a tribunal (including an arbitral tribunal).

## **7.3 Risks of Improper Use of Provisional Remedies**

Interim orders that are obtained by a plaintiff by fraud, for ulterior purposes or misused by the plaintiff, can be vacated by the court/tribunal and, in addition to any damages or compensation that the plaintiff may be ordered to pay, the court/tribunal may also impose costs on the plaintiff.

## **7.4 Availability of Temporary Injunctions**

Courts grant temporary/preliminary injunctions in relation to real estate matters; however, the same are dependent on the prima facie case, balance of convenience and the reasons for such injunction.

## **7.5 Proving Irreparable Harm**

In a real estate scenario, the following may illustrate instances of irreparable harm being likely to be caused/suffered:

- dealing with, alienation or encumbering the property to the detriment of the party alleging breach;

- carrying out construction and creating third party rights; or
- demolishing an existing building in a manner that would make it challenging or impossible for the aggrieved party to obtain specific performance.

## **7.6 Mechanic's Liens**

In India, the right of lien is recognised under the Indian Contract Act, 1872, wherein two types of lien are set out: (i) general lien; and (ii) particular lien.

In general lien, there is a right to retain the possession of a property for payment of the amount which is owed by the borrower and even in situations where the payment is not connected with the said property in possession. On the other hand, particular lien is in relation to the property and the person has the right to retain the possession of the property or goods until the charges in relation thereto are discharged/paid by the borrower.

Further, the SARFAESI Act excludes the lien as set out under the Indian Contract Act, 1872 or any other applicable law. However, the SARFAESI Act separately recognises right of secured lender/creditor on a secured asset (immovable property).

Lien (whether under the Indian Contract Act, 1872 or the SARFAESI Act) does not create ownership rights in favour of the lender/creditor in so far as the property is concerned. To enforce lien, the lender/creditor would be required to approach the court of law. For this purpose, the lender/creditor is required to prove in the court of law that the borrower/debtor has defaulted and enforcement of lien is pertinent to recover the dues.

## **8 Real Estate Investment Trusts (REITs) and Single-Family Rentals (SFRs)**

### **8.1 REIT/SFR Regulation**

The Real Estate (Regulation and Development) Act, 2016 is the central legislation governing the rights and liabilities of developers and landowners in the context of residential and commercial development transactions. Further, mutual rights and obligations of landowners and developers are also safeguarded under the dispute resolution mechanisms provided for under the said act. Under RERA, adjudicating authorities have been constituted which supervise and ensure that development is being undertaken in accordance

with the provisions of the said act and rules/directions made thereunder, from time to time.

Further, some states have also enacted legislations applicable to apartment buildings for the purpose of sale of apartments, such as the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963.

In the context of specialised real estate investment vehicles such as REITs, such entities are additionally regulated by sector regulators such as SEBI, which safeguards the interests of all investors in public markets. Under the REIT Regulations, REITs are primarily required to invest in rent-generating assets, and are only permitted to hold a portion of their investments in under-construction projects.

## **8.2 Public Interest**

The growing public interest in the real estate and construction sectors, particularly in areas such as transparency, sustainability, and regulatory compliance, has a significant impact on how firms approach their work. As stakeholders become increasingly aware of the environmental, social and governance (ESG) factors influencing development, firms are pushed to prioritise responsible practices and ethical decision-making. This heightened focus on public interest encourages alignment with best practices, ensuring that work not only meets regulatory standards but also contributes to long-term sustainability and trust within the sector. Recent updates to real estate laws in India, such as the growing emphasis on ESG standards, is positioning India as a global leader in sustainable construction and development.

The Securities and Exchange Board of India (SEBI) has also strengthened regulatory and governance requirements for Real Estate Investment Trusts (REITs) through the SEBI (Real Estate Investment Trusts) (Amendment) Regulations 2023. This has spurred increased interest from real estate developers and private equity funds, with more REITs expected to be launched soon.