

NCLT CASE STUDIES FOR REGISTERED VALUER - LAND & BUILDING



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1. ABOUT IBBI & NCLT

1.1 IBBI - Insolvency and Bankruptcy Board of India

- The Insolvency and Bankruptcy Board of India was established on 1st October, 2016 under the Insolvency and Bankruptcy Code, 2016 (Code).
- It is a Single Regulatory body whose job is to oversee the process, the personnel and the adjudicating bodies related to Insolvency and Bankruptcy.
- It has regulatory oversight over the Insolvency Professionals, Insolvency Professional Agencies, Insolvency Professional Entities and Information Utilities.
- Structure of IBBI: It is Comprised of 10 Members
 - 1 Chairman,
 - 1 Member nominated by RBI,
 - 3 members of central government &
 - 5 members nominated by central government
- Advantages:
 - Defragmentation of Insolvency and Bankruptcy laws.
 - Fast Insolvency Resolution.
 - Different Adjudicating authorities.

1.2 NCLT - National Company Law Tribunal

- "The Central Government has constituted National Company Law Tribunal (NCLT) under section 408 of the Companies Act, 2013 on 1st of June 2016.
- National Company Law Tribunal (NCLT) is a quasi-judicial body which was set up to resolve the disputes which are arising in Indian Companies. It is the successor to the Company Law Board. It is governed by the rules framed by the Central Government. NCLT is a special court where cases relating to civil court have been barred from the jurisdiction.
- Scope of National Company Law Tribunal

- To dealing with corporate disputes that are of civil nature arising under the Companies Act. Pertaining to claims of oppression and mismanagement of a company, winding up of companies and all other powers prescribed under the Companies Act.

➤ Advantages for National Company Law Tribunal

- NCLT is a specialized court only for Corporates, i.e., companies registered in India.
- NCLT will reduce the multiplicity of litigation before different forums and courts.
- NCLT has multiple branches and is able to provide justice at a close range.
- NCLT consists of both judicial and technical members while deciding on matters.
- Speedy disposal of cases will help reduce the number of cases also has exclusive jurisdiction.

1.2.1 BENCHES IN NCLT

In the first phase the Ministry of Corporate Affairs has set up eleven Benches,

- One Principal Bench at New Delhi &
- Ten other Benches at New Delhi, Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata and Mumbai are headed by the President Chief Justice (Retd.) Ramalingam Sudhakar and comprises of sixteen Judicial Members and nine Technical Members at different locations. Subsequently, more Benches at Cuttack, Jaipur, Kochi, Amravati available.

1.2.2 PROCESS TYPE

- When a company is in state of insolvency, its creditors will have two options i.e. either recovery or resolution.
- In other words, when insolvency proceedings commence against a company, there are two possible outcomes i.e. the sale of the existing business as a going concern (known as Insolvency Resolution) or the sale of the assets of the company (Known as Liquidation).
- The IBC is a single consolidated law which provides provisions for both; insolvency resolution and liquidation.
- Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") is a system incorporated in the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "The Code"). In this, a corporate debtor that has defaulted in making payments to its creditors undergoes an insolvency process.

The intent behind CIRP is to make an attempt at reviving the corporate debtor instead of liquidating or winding it up to reimburse the creditors.

- The Code, and subsequent amendments, have designated a period in which CIRP has to be concluded. CIRP commencement date is the date on which the adjudicating authority passes an order to admit the CIRP application.
- Liquidation is a process in which the company is brought to an end. Also, the assets and property of the company are redistributed to the creditors and owners. Liquidation is also referred to as winding-up or dissolution, although dissolution technically refers to the last stage of liquidation.
- Liquidation may either be compulsory or voluntary. The term liquidation is also used to describe that a company seeking it is ready to divest some of its assets. For instance, a retail chain may wish to close some of its stores.

2. IRP / RP & LIQUIDATOR

Interim Resolution Professional

- The adjudicating authority appoints a person on the commencement date of insolvency who will conduct the entire proceeding. This person is the Interim Resolution Professional (IRP).
- The IRP is responsible to conduct the proceedings of CIRP and also to ascertain the operations of the corporate debtor as a going concern.
 - As the term suggests, the IRP's appointment is temporary until a Resolution Professional is appointed by the Committee of Creditors (COC).
 - Duties of Interim Resolution Professional • Section 18 of the Code lays down the duties of the IRP in CIRP. The duties are as follows;
 - Collate information pertaining to the operations, assets and finances of the corporate debtor to understand its financial position;
 - Gather all the claims made by the creditors against the corporate debtor from the COC;
 - Manage finances and govern the operations of the corporate debtor as a going concern until an RP is appointed by the COC;
 - Take custody of all the assets, tangible or intangible, in the name of the corporate debtor until such process is in motion;
 - Any other duties as directed by the Insolvency and Bankruptcy Board of India (IBBI).
 - Appointment of Resolution Professional by COC
 - The IRP constitutes the COC by virtue of Section 18 of the Code. The COC's first order of business, after the commission of the committee, is to appoint the Resolution Professional. As per Section 22 of the Code, the COC holds its first meeting within 7

days of its constitution. In this meeting, the committee discusses if the IRP can be appointed as the Resolution Professional to continue to conduct the CIRP.

- Then the committee takes a vote and if the majority is equal to or more than sixty-six per cent, then the IRP becomes the Resolution Professional.
- However, the committee can also resolve to replace the IRP and appoint a difference licensed Resolution Professional to conduct the process. In this case, the committee applies to the adjudicating authority to appoint the Resolution Professional.
- The adjudicating authority subsequently chooses a Resolution Professional and forwards the choice to the IBBI for its approval. If the board does not approve the Resolution Professional as selected by the adjudicating authority, then the IRP resumes its position until IBBI appoints a person. This is also applicable in the case where the IBBI does not respond to the adjudicating authority within ten days of receiving the name.

Duties of Resolution Professional • The COC appoints the Resolution Professional who then conducts the CIRP. He is one of the most vital members of the entire process with several responsibilities and functions to perform.

3. Liquidator

- The liquidator is an insolvency professional on whom all the powers of the Board of Directors, key managerial personnel and the partners, as applicable, of the Corporate Debtor are vested by the Adjudicating Authority upon Liquidation order being passed under section 33 of the Insolvency and Bankruptcy Code, 2016. (The Code)
- Where the Adjudicating Authority passes an order for Liquidation of a corporate Debtor initially under CIRP, the Resolution Professional appointed under CIRP shall act as the Liquidator for the purpose of Liquidation unless replaced by the Adjudicating Authority. As per Section 34(4) of the Code, the Adjudicating Authority may order to replace the Liquidator if:
 - The resolution plan submitted by the Resolution Professional under section 30 of the Code, was rejected for failure to meet the requirements as per Section 30(2).,
 - The Insolvency and Bankruptcy Board of India (The Board) recommends the replacement of the Resolution Professional for recorded reasons; or,
 - The Resolution professional fails to submit written consent for appointment as Liquidator.
- For cases where the Resolution Professional is required to be replaced, the Adjudicating Authority may direct the Board to propose names of Insolvency

Professionals eligible to be appointed as Liquidator along with written consent form within 10 days of the direction issued, and upon receipt of the proposal, the order of appointment of Liquidator is passed.

3.1 DUTIES OF LIQUIDATORS

Section 35 of the Code enumerates the Powers and Duties of the Liquidator

- To verify claims of all the creditors and consolidate them;
- To evaluate the assets and property of the corporate debtor in the manner and prepare a report;
- To sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels, though transfer is subjected to section 52 and further the liquidator shall not sell the immovable and movable property or actionable claims to any person who is not eligible to be a resolution applicant.
- To draw, accept, make and endorse any negotiable instruments on behalf of the corporate debtor, with the same effect as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;
- To invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;
- To institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor;
- To investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;
- To take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;
- To apply to the Adjudicating Authority for such orders or directions as may be necessary and to report the progress of the liquidation process in a manner as may be specified by the Board; and
- To perform such other functions as may be specified by the Board.

4. ROLES & RESPONSIBILITIES OF REGISTERED VALUER – LAND & BUILDING

4.1 Valuer & Valuation

A “valuer” is an individual, group of individuals or individual within an entity, regardless of whether employed (internal) or engaged (contracted/external), possessing the necessary qualifications, ability and experience to execute a valuation in an objective, unbiased, ethical and competent manner. In some jurisdictions, licensing is required before one can act as a valuer.

Valuation

Under the Insolvency and Bankruptcy Code, 2016 (“IBC”), valuation of assets is one of the core features dealt with in a corporate insolvency resolution process (“CIRP”). The process of valuation conducted by “Registered Valuers” or valuation professionals helps determine the current value of the assets which are to be liquidated.

- Or The process of determining an opinion or conclusion of value of an asset on a stated basis of value at a specified date in compliance with IVS
- The requirement of valuation under the IBC is an important concern for Registered Valuers in all three asset classes: plant and machinery (“P&M”), land and building (“L&B”), as well as securities or financial assets.
- The importance of accurate valuation under IBC are as follows: • Valuation Report guides the actions of the Insolvency Professional, COC & NCLT;

Fair Value and Liquidation Value are frequently used by IBBI for statistical purpose to gauge performance of IBC;

- A Registered Valuer typically competes with market and endeavours to estimate a value which is more authentic than price of an asset;
- Valuation report is a common cause of dispute for Financial or Operational Creditor and may cause delay in Corporate Insolvency Resolution Process/ Liquidation Process;
- Difference in facts between two valuation reports can be trouble for IRP/RP.
- Few of the possible effects of under/ over valuation is as under:

(a) Possible effects of Under Valuation:

- (i) Abnormal gain by resolution applicant or Promoters of the company;
- (ii) Loss of Realizable Value for Financial and Operational Creditors;
- (iii) Possible loss of reputation for Registered Valuer.

(b) Possible effects of Over Valuation

- (i) Rejection of Resolution Plan which could have been approved;
- (ii) Delay in Liquidation Process due to requirement to repeat process;

QUOTE PART

- The IRP should invite the quotations from multiple Registered Valuers during the initial weeks of CIRP Commencement. IRP should use its wisdom to decide on the Registered Valuer for submitting the quotations depending upon the complexity and size of the Corporate Debtor.
- Seeking the Approval of COC:-
 - Basis Regulation 34 of the CIRP Regulations, the professional fees payable to the Registered Valuers forms part of Insolvency Resolution Process Cost, therefore, the RP shall take the approval of Fees to be paid to the Registered Valuers.
 - It does not require RP to take the approval for the appointment of specific Registered Valuer in the COC Meeting which states that the RP is free to decide on the Registered Valuer within the cost approved by the COC.

4.2 Appointment

- Regulation 27 of CIRP Regulations states that the Resolution Professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two Registered Valuers to determine the fair value and the liquidation value of the corporate debtor. In case the Resolution Professional is not appointed, Interim Resolution Professional to continue to function as the Resolution Professional until appointment of Resolution Professional
- Statutory provisions enabling the appointment of Registered Valuers under IBC
 - Section 59(3)(b)(ii) of IBC states that where a proposal for Voluntary winding up has been made by a Company, the Declaration of Insolvency given by Directors shall be accompanied with the Valuation report issued by Registered Valuer.
 - Section 46(2) of IBC states that in an application for avoiding a transaction as 'undervalued', the Adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions.
 - Regulation 27 of the CIRP Regulations mandates the appointment of two registered valuers by the Resolution Professional within seven days of his appointment but not later than forty seventh day of CIRP Commencement date.
 - Regulation 35 of the CIRP Regulations states that: If the two estimates of a value in an asset class are significantly different
 - on receipt of a proposal to appoint a third Registered Valuer from the committee of creditors, the resolution professional may appoint a third Registered Valuer for an asset class; ("significantly different" means a difference of twenty-five per cent. in

liquidation value under an asset class and the same shall be calculated as $(L1-L2)/L1$, where, L1= higher valuation of liquidation value & L2= lower valuation of liquidation value) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value

- Incorporating Confidentiality • During the Valuation Process, varied data of financial as well as non-financial nature is shared by the Insolvency Professional with the Registered Valuers, which may include propriety information.
- It is necessary to incorporate a Non-disclosure Clause in the appointment letter of the Registered Valuers to avoid misuse of information.
- The Non-disclosure clause may include but not limited to the following: -
- Advise not to disclose any confidential information at any stage.
- An undertaking to: maintain confidentiality; keeps confidential information safe and secure;

use confidential information solely for the purpose of considering, evaluating, negotiating or concluding purpose;

comply with provisions of law for the time being in force relating to confidentiality and insider trading;

protect any intellectual property of the Company;

not to disclose any confidential information / relevant information to any third party/person or entity with exceptions like it is made publicly available or is disclosed with consent or is required under law.

remain liable for any unauthorized disclosure by any such person or entity.

i Effective period for the confidentiality condition: It will remain valid even after the completion of the assignment.

ii Compliance to Regulation 27 of the CIRP Regulations

Regulation no. 27 restricts following person to be appointed as the Registered Valuer:

- ⊙ a relative of the resolution professional;
- ⊙ a related party of the corporate debtor;
- ⊙ an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or
- ⊙ a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.
- ⊙ Resolution professional while appointing the Registered Valuers should take the declaration from them that they are complying to Regulation 27 and the same may be taken in the appointment letter itself.

4.3 DATA COLLECTION / PROPERTY VISIT

As per Section 17(2)(d) of IBC read with Regulation 4 of CIRP regulation on “Access to books”, RP has the access to all the books, records, information, and documents as required for discharge of the duties. Since, the RP has the access to all the records, hence, he is expected to share all the information for facilitating the valuation process. Timely provision of information to the Registered Valuers would help in timely completion of valuation and thereby achieving the timely decision making in the CIRP and Liquidation Process.

Timelines for Completion of Valuation process, which requires timely action from RP for information sharing with the Registered Valuer.

4.4 DUE DUELLIGENCE & STATUTORY APPROVALS

Authenticity of any Valuation Report depends upon the type of information shared with the Registered Valuer. Hence, the authenticity of the documents shared with the Registered Valuer needs to be verified as the Registered Valuer is not responsible and makes no representations for the accuracy, completeness or authenticity of the records or information available to him. Therefore, the IRP/RP shall provide reliable information.

Valuer needs to plan entire valuation process in terms of time, efforts and resources that are required for each assignment.

4.5 REPORT PREPARATION AS PER IVS STANDARD

Bases of Valuation ICAI Valuation Standard 102 defines valuation bases as the indication of the type of value being used in an engagement. Different valuation bases may lead to different conclusions of value. Therefore, it is important for the Registered Valuer to identify the bases of value pertinent to the engagement.

5. VALUATION APPROACHES AND METHODS

Consideration must be given to the relevant and appropriate valuation approaches. One or more valuation approaches may be used in order to arrive at the value in accordance with the basis of value. The principal valuation approaches are:

- (a) Market approach,
- (b) Income approach, and
- (c) Cost approach
- Arriving at first stage valuation

- All factors must be considered in the first appraisal such that further adjustments are either minimal or non-existent.
- Drafting the valuation report
- Once the valuation is arrived at, report needs to be prepared as a final deliverable for the client. The first draft of the report must be prepared extensively incorporating the specific elements of the assignment. Templatization in report creation should be avoided. Each report should be specific, relevant and to the point for the client.
- Finalizing the report by revisiting it for completeness and accuracy
- Valuer shall ensure that report must provide right perspective and all perspectives are covered during preparation.
- The RP may adopt the procedure of getting a draft report/presentation from the valuers wherein valuer is able to give a draft report/presentation to the RP on the key assumptions and methodology to be adopted by him. This will enable a check that the methodology and the assumptions adopted by both the valuers are not materially different to avoid delay in the process on account of the valuation.
- The existing legal provisions stipulate that valuation report is to be shared with the RP by the valuer and the RP on receipt of Resolution plan and undertaking of confidentiality should share the valuation report with the COC.
- The valuation report and the approach being adopted for the same may be shared by the RP and or RV concerned with other stakeholders keeping in mind emerging jurisprudence and prevalent legal/regulatory provisions
- A well drafted report not only serves the purpose of conveying the valuation mentioned in it, but also creates the goodwill in the mind of readers about the valuer and his firm.
- There is not a particular form or format of report; however, the report must be sufficient to communicate to the intended users the scope of the valuation assignment, the work performed, and the conclusions reached.

6. FEES COLLECTION

- It is the Most Important thing a valuer can did.
- *Half-yearly Performance Review / Report To RVO*
- Finally, a valuer must report their Quarterly/Half-Yearly Performance review about the NCLT Cases which is handled so far to RVO.