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Cracking the Code: Demystifying Group Insolvency in India

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*The Insolvency and Bankruptcy Code 2016 (**IBC**) received its assent from the President of India and was notified in the Official Gazette on 28 May 2016. This Code is believed to be the most powerful legislation in the corporate regime of India and was introduced with the prime objective of rescuing corporate debtors in distress. IBC was promulgated by consolidating and amending the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner. There has been a steady growth of corporate houses and industries in India over the past 2 decades. However, with a rise in the number of companies in the corporate market, the number of companies becoming insolvent has also risen. The IBC has proven to be effective concerning insolvency proceedings of companies at an individual level. However, there is voidness in the Code when it comes to the matter of 'Group Insolvency' of a chain of companies under a single frame. The present era has deemed the introduction of provisions relating to group insolvency, but there has per se been no formal introduction. This paper focuses on the need for and importance of group insolvency and traces the evolution of the law by conducting a systematic study of the position of group insolvency at the international level and how the Insolvency framework can be further improved by introducing effective provisions to cover group insolvency in India.*

Keywords: *group insolvency, company, ibc, resolution professional, cirp.*

INTRODUCTION

Insolvency refers to the financial situation wherein a debtor is unable to repay his creditor. For the Insolvency and Bankruptcy Code 2016 ('**IBC'**), insolvency is the situation of a corporate debtor when he is unable to repay the dues, he owes to both financial and operational creditors. The IBC provides for Corporate Insolvency Resolution Process ('**CIRP**') under Part II Chapter II. Under the ambit of this, a comprehensive framework is set in motion for the Insolvency process of a corporate. Firstly, an Insolvency Application must be filed either by the corporate debtor[1] or by the creditor, Thereafter, the Adjudicating Authority will appoint an interim resolution professional[2], who is bound to form a Committee of Creditors ('**CoC**')[3]. The CoCs will thereafter decide whether the interim resolution professional be appointed as the resolution professional, or they may choose a different person as a resolution professional. The main role of the resolution professional is to conduct the entire resolution process and arrive at a resolution plan for the liquidation of the company or the revival of the company. Once the liquidation route has been opted by the Adjudicating Authority, a Company Liquidator is appointed by the Adjudicating Authority who shall handle the liquidation process, sell the assets of the company, and settle the dues as per the priority list towards the creditors. This is a standard process of how an insolvency process is carried out under the ambit of the IBC. This resolution process has panned out to be successful and effective in resolving the financial crisis of insolvent companies. However, the above process is only applicable in the case of corporate debtors and not in the case of individual debtors. Even though the IBC has incorporated provisions relating to individual debtors, the same has not been enabled and brought into force by the Government.

While the provisions of IBC are applicable to corporates, the insolvency process under the IBC is only regarding individual corporates sans any provisions about multiple companies operating under the same holding company or group.

Group Insolvency may be understood as the clubbing of the assets and liabilities of various individual subsidiary companies which includes the holding company for the purpose of

[1] Insolvency and Bankruptcy Code 2016, s 10
[2] Insolvency and Bankruptcy Code 2016, s 15
[3] Insolvency and Bankruptcy Code 2016, s 18

insolvency proceedings as a consolidation of companies. If all the insolvent subsidiary companies are brought under a single umbrella, the process of insolvency would be much simpler and the process of tracking the assets of these companies could become streamlined thereby reducing the burden on the Adjudicating Authorities. Moreover, a separate insolvency resolution process may prove to be complex and time-consuming if the subsidiary companies operate in different jurisdictions which usually is the case in a group or holding company structure. The difficulty of such proceedings is persistent in India, and this is inferred from a wide range of cases of a chain of companies becoming insolvent such as Jaypee, Educomp, Videocon, and IL&FS. Hence a group insolvency process would be a suitable and efficient alternative.

LITERATURE REVIEW

Ilya Kokorin (2019) stated that it should be necessary for all participating CoCs to vote in favour of a group plan with 66% of their respective voting shares. The liquidator must determine whether the group strategy for the corporate debtor be approved when a corporate debtor engaged in a group coordination proceeding is liquidated. Additionally, the group strategy must be submitted to the adjudicating authority after it has been authorised and is binding on all parties involved[4].

Varada Jahagirdar & Sanjhi Agarwal (2021) stated that the IBC does not contain any sections addressing group insolvency resolution, which has compelled and encouraged the need for judicial interpretations and an expansion of the IBC's purview. Conflicting interpretations of the legislation have resulted from judicial interpretations, despite their importance in areas where the law is lacking. The problem which persists is whether the corporate veil can be lifted by the force of law when there is no public interest or malafide purpose on the part of the corporate entity[5].

[4] Kokorin Ilya, 'The rise of 'group solution' in insolvency law and bank resolution' (2021) 22 European Business Organization Law Review <https://link.springer.com/article/10.1007/s40804-021-00220-4> accessed 25 February 2023

[5] Jahagirdar Varada and Sanjhi Agarwal, 'Group Insolvency: Time to Stop Relying on the Judiciary to Fill a Legislative Lacuna?' (2021) 98 RGNUL Finance & Mercantile Law Review

Poorna Poovamma K. M. & Abhishek Wadhawan (2020) stated that there are various challenges such as defining a corporate group, deciding the jurisdiction, countering the cross-border insolvency crisis and extension of the corporate liability. It is suggested that the definition of a corporate group should be based on the Centre of Main Interest ('**COMI**') of the group. For identifying the COMI, the head office should be considered. The Working Group's framework is workable and comprehensive but the same needs to be reformed to suit the IBC[6].

Kathlene Burke (2019) stated that the new Model Law addresses the coordination of multiple insolvency proceedings, permits "planning proceedings" to create a group insolvency solution, and offers relief that may be required while managing and coordinating an enterprise group insolvency[7].

OECD (2022) stated that related party transactions are one of the most important problems for corporate groups. Even though the interests of minority shareholders are put at peril because of related party transactions, intra-group transactions add to economic growth under certain conditions. Because of the significance of corporate groups in the economy, related party transactions are common in India[8].

Christoph G. Paulus (2007) stated that the insolvency of a business that is a member of a group of companies will frequently set off a domino effect, resulting in the downfall of the other group members. As a result, there are as many insolvent companies (and insolvency procedures) as there are members of the group; the norm is "one company, one insolvency, one proceeding." This phenomenon is especially noticeable when cross-border issues are at risk. As a result, it is

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<https://heinonline.org/HOL/Page?handle=hein.journals/rlfladme8&div=25&g_sent=1&casa_token=&collection=journals> accessed 01 March 2023

[6] Poorna Poovamma KM and Abhishek Wadhawan, 'Introduction of Group Insolvency Regime in India: Identifying the Challenges and Proposing the Solutions' (2020) 10 NLIU Law Review <https://heinonline.org/HOL/Page?handle=hein.journals/nliu10&div=17&g_sent=1&casa_token=&collection=journals> accessed 28 February 2023

[7] Kathlene Burke, 'UNCITRAL Adopts the Model Law on Enterprise Group Insolvency' (2019) Chase Cambria Company (Publishing) Ltd <https://www.skadden.com/-/media/files/publications/2019/09/uncitraladoptsthemodellawonenterprisegroupinsolven.pdf> accessed 26 February 2023

[8] 'Company Groups in India' (*OECD*, 2022) <https://www.oecd.org/corporate/Company-Groups-in-India-2022.pdf> accessed 02 March 2023

not surprising that, at least in continental Europe, the need and urgency for intensified deliberations have been acknowledged following the enactment of the European Insolvency Regulation in mid-2002[9].

GROUP INSOLVENCY AT THE INTERNATIONAL LEVEL

The concept of group insolvency started gaining recognition on the global stage only in the past decade. The European Insolvency Regulation Recast[10] (2015), the German Insolvency Code[11] and the UNCITRAL Model Law on Group Insolvency[12] (2019) are a few of the formal documents about the resolution of a group of companies at the international level.

EUROPEAN INSOLVENCY REGULATION RECAST (2015)

The original European Insolvency Regulation Recast ('**EIR Recast**') did not contain provisions about group insolvencies and did not address the definition of a group of companies. As time progressed, the European Union deemed it important to incorporate relevant provisions about group insolvencies and cross-border group insolvencies. To this effect, the original EIR Recast was amended in 2017 and provisions about group insolvencies were incorporated. Via the amendment, the EIR Recast now provided for a definition of a "group of companies." Under Article 2(13)[13] of the EIR Recast, a "group of companies" includes a parent undertaking and all its subsidiary undertakings.

The "group insolvency law" introduced by the EIR Recast aims to address the issue of effectively managing insolvency proceedings involving group companies and maximising the potential synergy value of the group as a whole while still upholding the fact that group companies are distinct legal entities.

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[9] Paulus G Christoph , 'Group Insolvencies-Some Thoughts About New Approaches' (2007) 42 Texas International Law Review <https://heinonline.org/HOL/Page?handle=hein.journals/tilj42&div=35&g_sent=1&casa_token=&collection=journals> accessed 26 February 2023

[10] European Insolvency Regulation (Recast) 2015

[11] Insolvency Code 1994

[12] UNCITRAL Model Law on Enterprise Group Insolvency 2019

[13] European Insolvency Regulation (Recast) 2015, art 2(13)

GERMAN INSOLVENCY CODE:

The German Insolvency Code was amended post the amendment to the EIR Recast to include provisions for group insolvency. Section 3e of the German Insolvency Code[14] defines a group of companies. As per this, a group of companies comprises legally independent companies whose centre of main interest is in Germany, and which are directly or indirectly affiliated on account of:-

- The possibility of exercising dominant influence;
- They're under common management.

It further encompasses provisions about the jurisdiction of the group, the appointment of administrators relating to group companies, creditors' committees, and other ancillary provisions. However, these provisions are weak and ambiguous compared to the personal and individual insolvency proceedings under the German Insolvency Code.

ITALIAN BANKRUPTCY CODE

The New Italian Bankruptcy Code[15] was enacted in 2019, which introduced specific provisions about group companies and insolvency processes relating to the same. As per the new Code, *the group of companies, enterprises, and entities that, exercise or are subject to management and coordination activities by a company, entity, or natural person*. The place where the debtor regularly manages its business which is recognised by others was defined as the Centre of Main Interest ('**COMI**')[16].

Companies belonging to the same group as their COMI in Italy are now allowed to file a single petition for group debt restructuring under the new rules. Each company's assets and liabilities must be segregated for this purpose, and no clubbing is permitted. *Concordo* proceedings are conducted systematically.

[14] Insolvency Code 1994, s 3e
[15] Business Crisis and Insolvency Code 2019
[16] 'The New Italian Insolvency Code', (*Ashurst*, 02 August 2022) <https://www.ashurst.com/en/news-and-insights/legal-updates/the-new-italian-insolvency-code/> accessed 24 February 2023

France, Belgium, and Spain have adopted similar provisions as that of the Italian Bankruptcy Code regarding the joint commencement of proceedings in the case of a group of companies[17].

POSITION IN THE UNITED KINGDOM

There is no formal legislation in the UK, however, the common practice is to appoint a common liquidator concerning multiple companies of the same group. However, there is no clarity regarding the jurisdiction aspect as the legal personality of companies takes primacy.

FEDERAL RULES OF BANKRUPTCY PROCEDURE (UNITED STATES)[18]

The US legislation has not provided for any standardized definition of a 'group of companies, but it has extended the application of the Rules of the Bankruptcy Procedure to 'affiliated companies. The US Bankruptcy Code's Section 510(c)[19] has expanded the scope of the courts' authority and gives them discretion to consider any claims based on equity. In the *Matter of Mobile Steel Co.*, the court ruled that there are three requirements for exercising the judges' discretion. First and foremost, the accuser had to act unfairly. Second, there must have been harm to the creditors because of the unfair behavior. Finally, the claim cannot conflict with the Insolvency Act's rules. Affiliated debtors have been treated as a single entity by combining their assets into a single pool of assets, with respective claims paid out of the single pool. This consolidation disregards each corporate affiliate's separate existence and cancels all inter-corporate contracts and claims.[20]

AUSTRALIAN CORPORATIONS ACT (2001)

A holding company is responsible for the debts of its subsidiaries under the Australian insolvency regime if those subsidiaries were insolvent at the time the debts were assumed or

[17] Kokorin Ilya (n 4)
[18] Federal Rules of Bankruptcy Procedure 1983
[19] United States Bankruptcy Code 1978, s 510 (c)
[20] Mark J Tung et al., 'Bankruptcy and Corporate Reorganization, Legal and Financial Materials' (*BU Law Libraries Search*, 2016) <https://buprimo.hosted.exlibrisgroup.com/primo-explore/fulldisplay?docid=ALMA_BOSU121856229730001161&context=L&vid=BULAW&search_scope=Everything&isFrbr=true&tab=default_tab&lang=en_US> accessed 25 February 2023

became insolvent because of those debts. However, if the holding company took all the necessary steps to prevent its subsidiaries from becoming insolvent, it will not be held liable.[21]

The Corporations Act permits 'pooling' which means that (a) each company in the group is jointly and severally liable for each debt owed by and a claim made against each in the group; (b) each debt owed by a company or companies in the group to another company or companies in the group is discharged; and (c) each claim made by a company or companies in the group against another company or companies in the group is discharged. Under provisions 571 to 579L of the Corporations Act of 2001, this pooling may take place during liquidation.

These clauses give the liquidator the authority to decide whether to pool assets, but that decision must be authorized by the unsecured creditors of each company at separate meetings. The pooling decision becomes effective if it receives the required amount of creditor approvals. However, a judge has the authority to change or overturn a pooling decision. The courts have on certain occasions allowed the pooling agreements even though it is outside of liquidation, provided it is made through deeds of company agreements which are authorized by a majority of the creditors. A deed can be set aside by the court if it is 'unfair or contrary to the interests of the creditors or the company as a whole.'

UNCITRAL MODEL LAW ON ENTERPRISE GROUP INSOLVENCY

The United Nations Commission on International Trade Law introduced the UNCITRAL Model Law on Enterprise Group Insolvency ('**Model Law**') to address cases of insolvency affecting the members of an enterprise group to protect certain interests and objects[22]. The Model Law encompasses 32 Articles and a separate Guide for the Model Law. The Model Law has in its best effort tried to address various issues surrounding group insolvency such as jurisdiction, coordination, procedural aspects etc., by making extensive provisions regarding the same.

[21] Australian Corporations Act 2001, s 588V
[22] UNCITRAL Model Law on Enterprise Group Insolvency 2019

Article 2(b)[23] of the Model Law defines an 'Enterprise group' to mean two or more enterprises that are interconnected by control or significant ownership. The essence of cooperation and coordination are the basis for the Model Law. Communication between courts, insolvency representatives, and group-appointed representatives, coordination of management of the enterprise group's affairs, and coordination of insolvency proceedings and hearings are all examples of cooperation in the Model Law.[24]

Furthermore, the Model Law allows for participation in a 'planning proceeding' to develop a group insolvency solution. The COMI of the debtor or the jurisdiction of the court which approves a separate planning proceeding are considered the main proceedings.[25] The group representative may ask the court for 'any suitable relief' to safeguard or maintain the worth of a business group member once a planning case has been started or acknowledged.[26] Interim relief is also available where an application for the recognition of a planning proceeding is pending and immediate protection for an enterprise group member is required[27].

UNDERSTANDING GROUP OF COMPANIES UNDER INDIAN CORPORATE LAW

There is no explicit definition of a 'group of companies' under the Companies Act 2013 or the Insolvency and Bankruptcy Code 2016. However, the government has itself clarified the meaning of a group of companies under the circular issued by the Reserve Bank of India in 2013 relating to Foreign Direct Investments in India. As per the circular, a 'group company' is defined as two or more businesses that, directly or tangentially, can: (i) exercise 26% or more of the voting rights in another business; or (ii) select more than 50% of the board members in the other business.

[23] UNCITRAL Model Law on Enterprise Group Insolvency 2019, art 2(b)
[24] Kathlene Burke (n 7)
[25] UNCITRAL Model Law on Enterprise Group Insolvency 2019, art 2(g)
[26] UNCITRAL Model Law on Enterprise Group Insolvency 2019, art 20
[27] UNCITRAL Model Law on Enterprise Group Insolvency 2019, art 22

Even though the Companies Act 2013 does not provide for an explicit definition of a 'group company', it defines a 'holding company'[28] and 'subsidiary company'[29]. The Companies Act also defines a business that has a substantial amount of impact but is not an affiliate and contains a joint venture as an 'associate company'[30]. Section 2(11)[31] lists what does not include a company, specifically a company incorporated outside of India, and section 2(87)'s explanation, which elaborates on subsidiary companies, states that 'company' includes any body of corporate. So even if it is not incorporated as a company, a foreign company can have a subsidiary in or outside of India, and an Indian holding company can have a subsidiary outside of India.

The Indian courts have also ascertained the meaning of a group of companies under various contexts. In *Vacmet Packagings (India) Pvt Ltd v Union of India*[32], the court held that the word 'group company,' on a plain reading, should ordinarily mean another company. Even if the meaning of 'enterprise' were stretched to include a firm, it must be shown that the firm as such, and not its partners, holds 26% voting rights in the company. In *Tata Teleservices Ltd. v Union of India*[33], the court stated that the definition of 'group company' would reveal that it means two or more enterprises. Secondly, they should be able to directly or indirectly exercise 26% or more voting rights in another company or select more than 50% of the other company's board of directors.

However, the courts have been equally strict in recognising the independent nature of the holding company and the subsidiaries and ascertaining a separate legal identity for both. In *Vodafone International Holdings BV v Union of India*[34], the Supreme Court held: *"It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. Further, if a company is a parent*

[28] Companies Act 2013, s 2(46)
[29] Companies Act 2013, s 2(87)
[30] Companies Act 2013, s 2(6)
[31] Companies Act 2013, s 2(11)
[32] *Vacmet Packagings Pvt Ltd v Union of India* (2010) SCC 4453
[33] *Tata Teleservices Ltd v Union of India* (2014) SCC Bom 4966
[34] *Vodafone International Holdings BV v Union of India* (2012) 6 SCC 613

company, that company's executive director(s) should lead the group and the company's shareholder's influence will generally be employed to that end. This implies a restriction on the autonomy of the subsidiary's executive Directors. Such a restriction, which is the inevitable consequence of any group structure, is generally accepted, both in corporate and tax laws."

The court further held that a holding company and a subsidiary company are considered separate legal entities, and a subsidiary is allowed to have decentralized management. The above context regarding the position of 'group company' deems it important for the Parliament to reduce the complexity and ambiguity regarding the same and introduce necessary provisions for the definition of 'group company' under the Companies Act and extend the same to other Corporate Laws.

GROUP INSOLVENCY UNDER THE INDIAN REGIME:

In *Solomon v A. Solomon & Co. Ltd*[35], the House of Lords laid out the doctrine of the separate legal personality of an entity. This doctrine holds good in the Indian Corporate regime and has been encompassed in the IBC. The courts of this country have also accepted this doctrine of separate legal entities on multiple instances. The presence of this doctrine makes it difficult the inclusion the concept of 'group company' in the Indian context as the corollary which arises is since the holding and subsidiaries have a separate legal existence, group insolvency cannot be initiated[36].

Notwithstanding the interpretations relating to the nature of 'group company' in the Indian context, and the possibility of inclusion of 'group company' under the IBC by interpreting the definition of a person and a company, the procedural and substantive aspects for conducting a group insolvency proceeding is still ambiguous. This necessitates the inclusion of provisions relating to the same by the Parliament under the IBC.

Issues arising due to the lack of group insolvency provisions:

- Multiplicity of applications;

[35] *Solomon* v *A Solomon & Co Ltd* [1897] A C 22
[36] Poorna Poovamma KM and Abhishek Wadhawan (n 6)

- Expansive Jurisdiction;
- The individual legal identity of subsidiary companies;
- Difficulty in the consolidation of relevant assets of the insolvent companies;
- Even though there has been no formal introduction of provisions regarding group insolvency by the Parliament, the judiciary has exercised its Judicial Review in recognising group insolvency and permitting the same in various instances. A perusal of the significant judgments of the Indian courts is important to understand the position of group insolvency in the Indian context.

IMPORTANT JUDGMENTS ABOUT 'GROUP INSOLVENCY' IN INDIA

***State Bank of India and Another v Videocon Industries Limited and Others*[37]:** This case pertains to the initiation of CIRP proceedings against the various companies that form part of the Videocon Group of Companies. A total of 13 company petitions were filed across various National Company Law Tribunals ('**NCLTs**'). Upon an application requesting the transfer of all these company petitions for CIRP under the Principal Bench Delhi, the Principal Bench accepted this and consolidated 13 CIRP applications together. The Principal Bench considered the precedent of group insolvency under UNCITRAL Model Law, USA, Germany, and European Union. It further stated that it is appropriate and suitable to give a ruling on this occasion that there is no single yardstick or measurement based on which a motion of consolidation can or cannot be approved. It further set out a list of examples of what would be a consolidation of the insolvency process based on the historical reading of 'group insolvency.'

***Edelweiss Asset Reconstruction Company Limited v Sachet Infrastructure Pvt. Ltd*[38]:** This is a case involving multiple CIRP applications against multiple Borrowers. The appellant was one such borrower who has filed a separate CIRP under section 7 of the IBC. The National Company Law Appellate Tribunal ('**NCLAT**') observed that due to the joint consortium of different Corporate Debtors, group insolvency is required and the CIRP is to be initiated against the sole Developer. The NCLAT clubbed 5 CIRPs and other applications as part of a group insolvency

[37] *SBI v Videocon Industries Ltd* (2019) SCC NCLT 34792
[38] *Edelweiss Asset Reconstruction Company Limited v Sachet Infrastructure Pvt Ltd* (2019) SCC NCLAT 592

process and remitted the case back to the Adjudicating Authority directing it to conduct the proceedings as a 'group insolvency proceeding'.

***Union of India v Infrastructure Leasing & Financial Services Ltd*[39]:** Considering the larger public interest involved, the Government of India proceeded to initiate the present application under sub-section (2) of section 241 of the Companies Act. The IL & FS group consisted of around 348 companies and individual proceedings against each of them by different creditors and stakeholders would not be possible. Even though this case did not directly deal with the IBC, the NCLAT in its order stated that through various matters, the IBC Law has evolved wherein 'group insolvency' is permissible.

***Fortuna Urbanscape (P) Ltd. v Shivadutt Bannanje*[40]:** In an application for the acceptance of the resolution plan submitted by the resolution professional relating to CIRP of Fortuna Urbanscape Private Ltd., the NCLT observed that if the rules of group insolvency were applied in the present case, many projects could have been saved from going through this kind of distress sale as in the case of present scenario.

***Sanghvi Movers Ltd. v Albanna Engineering (India) (P) Ltd*[41]**: Under the CIRP proceedings, the decision of the principal bench of NCLT in the *Videocon case* was considered and upheld. The NCLT after perusing the relevant facts, deemed it fit to consider the case as involving 'group insolvency' and discussed the report of the Insolvency Law Committee and the Working Group on *Group Insolvency. The position of the Indian courts is clear from the above-perused judgments – the courts have recognised the need for 'group insolvency' in India and have also permitted the combination of proceedings for ease of conducting the entire CIRP proceedings.*

A CONTRARY VIEW

However, the courts have equally recognised and differentiated the individual legal identity of the holding and the subsidiary companies. In the *Vodafone Case*[42], the Supreme Court held that

[39] *Union of India v Infrastructure Leasing & Financial Services Ltd* (2021) SCC NCLAT 1102
[40] *Fortuna Urbanscape (P) Ltd v Shivadutt Bannanje* (2021) SCC NCLT 2909
[41] *Sanghvi Movers Ltd V Albanna Engineering (India) Ltd* (2020) SCC NCLT 8959
[42] *Vodafone International Holdings BV v Union of India* (2012) 6 SCC 613

the wholly owned subsidiary ('**WOS**') and the holding companies were distinct, and the assets of the WOS are not owned by the holding company. The recent judgment of the NCLAT in the case of *Greater Noida Industrial Development Authority (GNIDA) v Roma Unicon Designex Consortium*[43] is an important consideration. The NCLAT set aside the order of the NCLT and held that the assets of the subsidiary company cannot be dealt with in CIRP proceedings of the holding company without the permission of the Lessor. These judgments portray the present intent of the judiciary.

It would be unfair to state that there have been no efforts from the side of the Government. The Government conducted a comprehensive study on group insolvency in 2019. The report of the Working Group on Group Insolvency was made public on 23 September 2019. Another significant report on Group Insolvency was released by the Cross Border Insolvency Rules/Regulations Committee ('**CBIRC II**') on 10 December 2021. The brief of the reports submitted by these committees must be considered to understand the position of group insolvency in India and the dire need for the implementation of the same.

WORKING GROUP ON GROUP INSOLVENCY

A Working Group was constituted by the Insolvency and Bankruptcy Board of India ('**IBBI**') on 17 January 2019 to recommend a framework for the collective insolvency resolution as well as the liquidation of group companies. This Working Group was established under the chairmanship of U.K. Sinha in consultation with various stakeholders and other working members. The Working Group conducted extensive research by considering the position of group insolvency across the globe and took critical inputs from various stakeholders and the possibility of including a framework for group insolvency. This was undertaken by considering the difficulties in insolvency proceedings of certain corporate debtors such as Videocon, IL & FS, Educomp, Lanco, Jaypee and Aircel.

[43] *Greater Noida Industrial Development Authority (GNIDA) v Roma Unicon Designex Consortium* (2022) Com App No 180/2022

The following are the brief recommendations of the Working Group regarding the rationale, elements, and applicable design of a possible framework for the insolvency of companies in corporate groups[44]:

- A framework for group company liquidation and insolvency resolution may be contemplated by the legislation. Relevant business stakeholders may use the framework voluntarily and it may be enabling.
- The framework may be implemented in different stages. The first phase may facilitate the introduction of only domestic group companies and rules against perverse behaviour. Cross-border group insolvency and substantive consolidation could be considered at a later stage, depending on the experience of implementing the earlier phases of the framework and the perceived need at the relevant time.
- The Companies Act 2013, may provide for the definition of a 'corporate group', which may include holding, subsidiary, and associate companies. However, an application may be made to the Adjudicating Authority to include companies that are so inextricably linked that they form part of a 'group' in commercial understanding but are not covered by the definition of the corporate group above.

In the first phase, the framework may provide for procedural coordination as follows:

- The framework may include the following procedural coordination elements:
- Collaborative application; Communication sharing; A sole resolution professional and Adjudicating Authority; The formation of a group creditors' committee; and Group coordination proceedings.
- All corporate debtors that have defaulted and are a member of a group may be the subject of a joint application. Companies that are part of a group and have been accepted into CIRP may be given access to additional procedural collaboration tools.

[44] Report of the Working Group on Group Insolvency (2019)

- Cooperation, communication, and information exchange among insolvency professionals, CoC, and Adjudicating Authorities may be necessary for enterprises admitted to CIRP while all other procedural coordination measures are optional.

Additional procedures may be employed:

- Joint Application
- Single Resolution Professional and Single Adjudicating Authority
- Group Creditors' Committee
- Group Coordination Proceedings
- The framework may also provide room for the inclusion of specific rules and regulations which will lay out the clear procedures and roles for the Adjudicating Authority and other members.[45]

REPORT OF CROSS BORDER INSOLVENCY RESOLUTION COMMITTEE II ON GROUP INSOLVENCY

This committee was established under the Chairmanship of Dr. K.P. Krishnan to conduct a study on group insolvency. The committee submitted its report on 10 December 2021 providing recommendations based on the UNCITRAL Model Law on Enterprise Group Insolvency with the view of bringing amendments to the Insolvency and Bankruptcy Code 2016.

The Committee laid out the following recommendations regarding the inclusion of group insolvency[46]:

- The Code should include a group insolvency framework that is voluntary, flexible, and enabling. A framework of this type could be implemented in stages. Only provisions governing domestic group insolvency may be used in the first phase.
- The meaning of 'group' should be wide and all-encompassing to accommodate numerous corporate creditors. A group can be identified by the factors of authority and

[45] Jahagirdar Varada (n 4)
[46] Report of CBIRC-II on Group Insolvency 2021

substantial possession. Additionally, it was proposed that the definition of a group shall apply to all entities that meet the criteria for being considered as 'corporate debtors' under the IBC, including corporations and LLPs.

- Only corporate creditors who are going through a CIRP or liquidation procedure are subject to the group insolvency structure. Additionally, the legislation does not extend to the group's financially solvent members.
- There exists a possibility to file joint applications for the start of CIRP against several corporate creditors that are part of the same company. Even though filing collectively is allowed, each debtor's registration form must be submitted separately.
- The Committee has suggested that the same Adjudicating Authority hear all cases involving corporate debtors from the same group. To that end, the NCLT, which is the first to accept an application for insolvency resolution, may receive all pending applications and procedures involving a group member.
- The Committee recommends creating a group CoC with sufficient representation from the CoCs of each group member. The group CoC should not be charged with making decisions that have an impact on the parties' actual rights and duties because it can only offer procedural support. Furthermore, the parties may agree to discuss the structure and creation of a group CoC.
- Corporate debtors take part in group coordination procedures voluntarily. Up to 30 days after they are started, the CoCs can take part in the group coordination procedures. Any opt-ins after that point might be allowed with the consent of the involved CoCs and liquidators. Additionally, each CoC would need to vote in favour of the opt-in with at least 50% of their voting shares for the approval to be given.
- A group plan should only be approved by 66% of the voting shares of each participating CoC. The liquidator of a corporate debtor who is a party to a group coordination proceeding must determine whether to endorse the group plan on behalf of the corporate debtor it represents. Additionally, the group strategy is enforceable against all parties involved after it has been authorised and must be filed with the adjudicating authority

- These recommendations are consistent with the report of the Working Group on Group Insolvency. Significant time has elapsed since the publication of the Report by the CBIRC – II, yet no formal legislation has been incorporated to introduce the framework for group insolvency.
- However, the intent of the Government to introduce a framework for group insolvency can be noted by the Notice of the Ministry of Corporate Affairs. In its notice to invite comments from the public on changes being considered to the IBC, the Ministry has considered amending the IBC to provide a detailed framework for domestic group insolvency proceedings as per the Report of the CBIRC – II.

THE NEED FOR A FRAMEWORK ABOUT GROUP INSOLVENCY

Irrespective of the role that the judiciary is playing and the possible interpretations to include group insolvency under the Indian Corporate Regime, the dire need for a specific framework for group insolvency is a primary concern amongst creditors and corporates. The following are the factors that deem it necessary the introduction of a separate framework for group insolvency in India:

Increasing Corporate Groups in India: India is one of the fastest-growing economies in the world, having recently surpassed the United Kingdom. Foreign investments are on the rise while also domestic corporates have been growing and expanding rapidly. Large companies have always found it meaningful and efficient to operate by setting up different subsidiaries and group companies under the supervision and control of a holding company. As per a report by the Organisation for Economic Cooperation and Development (OECD) on Company Groups in India, related party transactions and company groups have been on a steady rise in India. In 2006, around 5.5% of the total income of the companies came from related party transactions. This number has significantly risen to 11.0% in 2019[47]. Just as this is a good sign for the market,

[47] 'Company Groups in India' (*OECD*, 2022) <https://www.oecd.org/corporate/Company-Groups-in-India-2022.pdf> accessed 02 March 2023

a concern relating to the bankruptcy of these companies is a due factor to be considered to implement effective group insolvency laws.

Reducing the burden on the courts:[48] Non-presence of legislation about group insolvency burdens the courts with a multiplicity of applications. A group company may consist of several subsidiaries (for example, *IL & FS Group*, consisting of 348 companies). Individual resolution application and subsequent appointment of resolution professional and company liquidator and considering the other subsidiaries who have filed similar applications under various other NCLTs would be a burden on the Adjudicating Authorities to effectively adjudicate and resolve the matter. The inclusion of a separate framework for group insolvency would solve this problem.

Reduce the burden on Resolution Professional and Liquidator: The Resolution Professional and the Company Liquidator are the ones who peruse all the relevant documents of the bankrupt company by assessing their assets and how effectively the resolution process can be concluded. If multiple applications are filed across various jurisdictions and multiple resolution professionals have been appointed, there will be a lack of coordination among them to effectively peruse the relevant documents as there exists relevant party transactions as well as the combined nature of assets. The group insolvency framework may be able to provide a solution for this by employing a common group of resolution professionals who would work on the assets of the holding and subsidiaries in determining the appropriate action for the protection of the creditor's interest.

Effective Resolution: A combined resolution process will prove to be more effective than individual insolvency proceedings across various jurisdictions. The jurisdiction of the holding company could be the place of effective resolution and the application may be decided under that jurisdiction by collating all the required details. Moreover, the main object of the IBC, which is the 'revival of the company' may be fulfilled through a combined resolution process instead of separate insolvency proceedings.

[48] Poorna Poovamma KM (n 6)

AUTHOR'S COMMENTS

The Positives: The reports of the Working Group as well as the CBIRC – II look promising and head towards the achievement of an idealistic framework for group insolvency. Moreover, the suggestions of these committees are holistic and have considered the international position of group insolvency. They have not merely relied upon the insolvency legislations of other countries but came out with recommendations for an India-specific group insolvency regime. The general framework after taking into consideration the different committee reports, judgments of the courts and opinions of experts appears to be as follows:

The first step is the identification of all the related companies including the holding company. Thereafter, a common application is to be made before a single Adjudicating Authority. The other provisions about CIRP under the IBC would apply to these proceedings considering the insolvent company under the CIRP to be a group company. A common committee of creditors (CoC) will be determined, and meetings will be conducted. A common Resolution Professional would be appointed to undertake the entire process. Thereafter, a group strategy will be provided to the Adjudicating Authority who will provide the necessary directions for the actions.

The Challenges/Areas of Concern: The foremost challenge for the group insolvency regime in India post-enactment would be the issue of a cross-border subsidiary and holding companies. All the reports and prior findings show the intent to place a primary focus on the domestic group insolvency framework. Cross-border insolvency provisions have not been introduced under the IBC and there exists a lacuna regarding the same. Only when the problem of cross-border insolvency is addressed can an effective process be penned down for group insolvency.

Moreover, the legislators should introduce a separate 'body of resolution professionals' instead of a common resolution professional. A body of resolution professionals would be much more effective than a single resolution professional, as it would reduce the burden on the resolution professional and will add more expertise to the insolvency resolution process.

The reports have not considered increasing the Adjudicating Authority's power to *suo moto* prefer for group insolvency proceedings. If such a power (along with certain checks) is provided, it would result in a monumental shift towards a swift resolution. Further, none of the reports has encapsulated the position where only a small fraction of the subsidiaries has become insolvent, and the other subsidiaries are healthy. The question which arises is whether the group insolvency process can be invoked in such an instance. Another area of concern is that a significant amount of time has elapsed since the reports of governmental organisations have been published. Yet there has been no positive step towards the implementation of the group insolvency framework.

CONCLUSION

The Group Insolvency as such is an engaging corporate restricting phenomenon, which has demanded discussion at the global and regional levels. Even though few legislations across the globe give preference to and enable group insolvency proceedings, there is no perfect framework for the same. Even the UNCITRAL Model Law on Group Insolvency lacks on multiple fronts. The major concerns for the Group Insolvency framework in India are the uncertainty in the application of the principles of Group Insolvency and the sad reality that the legal system may not be able to encompass the harsh principles of insolvency against group companies. This is inferred from the fact that even though the Insolvency Committee as well as the IBBI have submitted positive reports for the inclusion of Group Insolvency Proceedings under the IBC, no formal legislation in this aspect has been introduced. Moreover, various difficulties persist in determining the centre of the main interest of the group company, the jurisdiction of the Adjudicating Authority, the complexity of proceedings and the nature of the reaction. One of the main challenges is the lack of a clear legal framework for group insolvency, which has resulted in inconsistencies and ambiguities in the application of the IBC to group insolvency cases. Another challenge is the complex structure of group companies, which makes it difficult to identify the assets and liabilities of each entity and allocate them appropriately. Furthermore, the current insolvency framework in India is geared towards individual insolvency and may not be sufficient to address the unique issues that arise in group insolvency

cases. There is a need for specialized expertise and resources to effectively handle group insolvency cases. Moreover, there is a lack of clarity regarding the rights of the different groups of creditors and other stakeholders who will inherently be part of the group insolvency process. In the group insolvency framework under the IBC, a broad definition of 'group' should be provided to include many corporate debtors within the ambit of the framework. The group insolvency framework is expected to be introduced by the end of 2024 by the Parliament, considering the reports of the IBBI as well as the notice by the Ministry of Corporate Affairs. The framework also seeks to streamline the entire resolution process of group companies and aims at improving the efficiency of the resolution system as well as reducing the burden of jurisdiction and multiplicity of applications.

Will the framework truly solves the problem or not, will only be determined by time. The public reaction will lay out the extent of the implementation of the group insolvency framework in India.