

INTRODUCTION OF GROUP INSOLVENCY REGIME IN INDIA: IDENTIFYING THE CHALLENGES AND PROPOSING THE SOLUTIONS

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Abstract

The Insolvency & Bankruptcy Code, 2016 is one of the most recent Indian legislations that deals with insolvency of companies in India. Originally, the Insolvency & Bankruptcy Code did not contain any provisions for group insolvencies as the legislation itself was at a nascent stage. However, over the years, the number of conglomerates, multi-national corporations, related party transactions etc., have exponentially risen in India due to which the interconnectedness between different corporate bodies has increased. The Insolvency & Bankruptcy Board of India constituted a Working Group on Group Insolvency under the chairmanship of U.K. Sinha to delve upon the mechanism for group insolvency regime in India. The Working Group submitted its report in September 2019. In light of the recommendations of the Working Group, the main aim of this paper is

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to identify the most concerning issues in relation to introduction of group insolvency in India and proposing solutions to these problems. Part 1 of the paper deals with the basic conceptual understanding of group insolvency. Part 2 discusses the current Indian jurisprudence in relation to group insolvency through judicial decisions, and also highlights the key provisions of the Report of the Working Group on Group Insolvency. Part 3 identifies the various challenges posed to the introduction of group insolvency regime in India related to the definition of corporate group, jurisdictional challenges, cross border insolvency issues, and the problem of extension of liability in group insolvency proceedings. Part 3 also highlights the probable solutions to the challenges so identified, followed by Part 4, which deals with the concluding remarks for the paper.

I. INTRODUCTION: A CONCEPTUAL UNDERSTANDING OF GROUP INSOLVENCY

The Insolvency & Bankruptcy Code, 2016 (“**IBC**”) currently consists of a broad framework for initiating and resolving insolvency and liquidation processes of a single corporate entity. Only such single corporate entities were covered under the IBC in the initial phase as it was believed that sufficient infrastructure was not available in the Indian legal scenario to deal with group insolvencies.

While the success of the IBC in resolving various insolvency proceedings has been immense, the pertinent issue related to insolvency proceedings of group insolvent enterprises has been bothering the Adjudicating Authorities, Appellate Authority and the Courts alike. The increased competitive corporate world today has pushed the companies to engage in modern business strategies like expanding their businesses through subsidiary companies and entering into related party transactions. India has been ranked at the 20th position out of a total of 190 countries in the related party transaction index.¹

Further, the current Code is based on the doctrine of separate legal entity as laid down in *Solomon v. A Solomon & Co. Ltd.*² The House of Lords had essentially created a corporate veil between the corporate entity and its owners and key personnel managers, and observed that an incorporated company has a separate legal entity.³ Further, the Supreme Court in *Tata Engineering & Locomotive Co. Ltd. v. State of Bihar*, held that an incorporated company has a legal existence and identification of its own, having assets, liabilities and powers which are distinct from its members.⁴ Due to the existence of the separate legal entity principle, a corporate veil is not only created between the corporate entity and the other stakeholders of the company, but also between the different corporate bodies within a single group company, though they all are working as a single economic entity.

¹Dan Puchniak & Umakanth Varottil, 'Related Party Transactions in Commonwealth Asia: Complexity Revealed' (2018) NUS Law Working Paper Series 2018/014, <https://www.researchgate.net/publication/325332737_Related_Party_Transactions_in_Commonwealth_Asia_Complexity_Revealed> accessed 27 June 2020.

²*Solomon v A Solomon & Co. Ltd* (1897) A.C. 22.

³ibid.

⁴*Tata Engineering & Locomotive Co. Ltd. v State of Bihar* 1964 SCR (6) 885.

It is often argued that group insolvency cannot be initiated against group companies as the parent company and the subsidiaries have a separate legal existence.⁵ However, this argument seems to be flawed as courts have often disregarded the principle laid down in the Solomon case⁶ to lift the corporate veil between the group companies and considered them to be a part of a single economic entity. It was in *DHN Food Distributors Ltd. v. Tower Hamlets* wherein the Court of Appeal recognised a group of three companies as a single economic entity.⁷ Further, the Supreme Court of India in *Life Insurance Corporation of India v. Escorts Ltd & Ors.* observed that the corporate veil can be lifted in cases where the associated companies are connected to each other in such a way that they are a single concern depending on the provisions of the law and the objects to be achieved.⁸ The corporate veil may not be always lifted but has become more transparent in modern company jurisprudence.⁹

It is a common practice with the businesses to enter into related party transactions that indeed closely form the group companies as a single economic entity.¹⁰ The UNCITRAL Legislative Guide on Insolvency Law on Treatment of Enterprise Groups in Insolvency (“**UNCITRAL Guide**”) also suggests that such group corporate structures lead to various difficulties in insolvency proceedings such as expenditure of money and time to differentiate the layers of related transactions between the group companies, non-commercially viable transactions

⁵*Turner Morrison & Co. Ltd. v. Hungerford Investment Trust Ltd.* AIR 1969 Cal 238.

⁶*Solomon* (n 2).

⁷*DHN Food Distributors Ltd. v. Tower Hamlets* 1 WLR 852.

⁸*Life Insurance Corporation of India v. Escorts Ltd & Ors.* (1985) Suppl 3 SCR 909.

⁹*State of Uttar Pradesh v. Renusagar Power Co. & Ors.* 1988 AIR SC 1737.

¹⁰Vardaan Ahluwalia & Varsha Yogish, ‘Staggered Lifting of the Corporate Veil: A Case for Group Insolvency Norms’ (*India Corporate Law*, 21 October 2019) <https://corporate.cyrilamarchandblogs.com/2019/10/group-insolvency-norms/#_ftn7> accessed 21 June 2020.

outside the group companies, ignorance of high intra group transactions, etc.¹¹ With the increased presence of conglomerates and group companies in the Indian economic scenario, recognising the need for introducing group insolvency regime in India, the Insolvency and Bankruptcy Board of India constituted the Working Group on Group Insolvency under the chairmanship of U.K. Sinha, which submitted its report in September 2019.¹² This report proposed a draft procedure for the initiation of group insolvency proceedings in India so that the group can be restructured and the combined assets of the group company result into better value maximisation of the corporate group, as a whole.¹³

While the IBC does not contain any provisions for group insolvencies, the Companies Act, 2013 considers the group companies as a single economic entity and thus parent companies are mandated to prepare consolidated financial statements for its subsidiary companies.¹⁴ Further, in *Exclusive Motors Pvt. Ltd. v. Automobil Lamborghini S.P.A.*, the Competition Commission of India accepted the single economic entity principle and observed that an internal agreement between subsidiaries of the same economic group cannot be challenged for anti-competitive practices under Section 3 of the Competition Act, 2002.¹⁵ Thus, the changing notions within the Companies Act, 2013 and the Competition Act, 2002 show the positive attitude of the tribunals and the Courts in India to recognise the single economic entity principle in India in situations where the subsidiary companies are so closely linked to each other that they

¹¹UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency* (2012), para 92-94, 54-55.

¹²Insolvency and Bankruptcy Board of India, *Report of the Working Group on Group Insolvency* (2019) 3 <<https://www.ibbi.gov.in/uploads/whatsnew/2019-10-12-004043-ep0vq-d2b41342411e65d9558a8c0d8bb6c666.pdf>>.

¹³ibid.

¹⁴Companies Act 2013, s 129 (3) (India).

¹⁵Competition Act 2002, s 3 (India).

affect each other's economic activities. This further strengthens the need to introduce the single economic entity principle in IBC through the initiation of the group insolvency regime in India.

II. UNDERSTANDING THE CURRENT INDIAN JURISPRUDENCE

A. ASSESSING THE INTENTION OF THE NCLT, NCLAT AND THE SUPREME COURT

In a general context, the Indian courts have often noted that the concept of lifting of the corporate veil should be used cautiously and sparingly. The Supreme Court in *Vodafone International Holdings BV v. Union of India* observed that for considering the group companies as a single entity, it must be shown that the core activities of the company are controlled by the parent company.¹⁶ Only when this necessary condition is satisfied, the corporate veil between the group companies should be lifted.¹⁷ Interestingly, the High Court of Andhra Pradesh in *Walnut Packaging Private Limited v. The Sirpur Paper Mills Ltd. & Anr.* noted that the principle of piercing the corporate veil cannot be applied in cases of winding up of holding companies when a default in payment is made by any of its subsidiaries.¹⁸ Thus, in essence, the pre-IBC era did not appreciate the practice of lifting the corporate veil and considering the group entities as a single economic entity for the purpose of restructuring and winding up of the companies.

¹⁶*Vodafone International Holdings BV v. Union of India* (2012) 6 SCC 613.

¹⁷*ibid.*

¹⁸*Walnut Packaging Private Limited v. The Sirpur Paper Mills Ltd. & Anr* 2008 SCC OnLine AP 840.

The IBC does not contain any provision for group insolvency, however, there have been many instances before the National Company Law Tribunal (“NCLT”) that created an impetus for the Tribunal to pave way for initiation of group insolvency regime in India. The order of the Principal Bench of NCLT in *Venugopal Dhoot v. State Bank of India & Ors.* is a landmark order as it directed the hearing of insolvency proceedings for various different group companies of the Videocon group to be heard by the same Adjudicating Authority to avoid any conflict of orders at the request of the parties in the matter.¹⁹ In yet another landmark order in *State Bank of India v. Videocon Industries Ltd. & Ors.*, the Adjudicating Authority ordered the substantive consolidation of the assets of the thirteen Videocon companies in pursuance of the common directors, common assets and the singleness of the economics of units.²⁰ This ruling, in essence, laid the building blocks for introduction of group insolvency regime in India, and the introduction of the single economic entity principle in the IBC.

While the decision in Videocon Industries led to the initiation of group insolvency process at a very nascent stage in India, the order of the National Company Law Appellate Tribunal (“NCLAT”) in the matter of *Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd. & Ors.*,²¹ is yet another development in this field. In this matter, the Appellate Authority ordered for a simultaneous Corporate Insolvency Resolution Process (“CIRP”) to be initiated for a group of five companies through a single Resolution Professional and explicitly identified the need to initiate group

¹⁹*Venugopal Dhoot v. State Bank of India & Ors.* (2018) SCC OnLine NCLT 29551.

²⁰*State Bank of India v. Videocon Industries Ltd. & Ors* M.A 1306/ 2018 & Ors. in CP No. 02/2018 & Ors- decision dated 08.08.2019.

²¹*Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd. & Ors* 2019 SCC OnLine NCLAT 592.

insolvency proceedings in the matter.²² The insolvency proceedings against these five different companies were consolidated by the Appellate Authority as these companies had common assets in a town planning scheme, and unless all the companies were recovered from their insolvency proceedings, the township would not be fully completed and the creditors would suffer. Thus, this order shows that group insolvency proceedings may be beneficial in cases where companies have common assets, and such consolidation of the proceedings will result into better asset maximisation and satisfaction of the creditors.

While these orders show the positive attitude of the NCLTs and the Appellate Authority towards introduction of the group insolvency regime in India, the Supreme Court has also signalled towards the need for such a structure in the Indian insolvency laws. The Supreme Court in *Chitra Sharma & Ors. v. Union of India*²³ ordered the Jaypee Group to deposit a hefty amount for the insolvency proceedings initiated against its group companies. Further, in the matter of *Bikram Chatterji & Ors. v. Union of India*,²⁴ the Court ordered the parent company's assets to be attached in view of the insolvency proceedings initiated against the different companies under the Amrapali Group.

These judicial decisions and Tribunal orders indicate that even though the IBC contains no provision for initiating group insolvency in India, the Adjudicating Authority, the Appellate Authority and even the Supreme Court have shown a positive attitude towards induction of the single economic entity principle in the Indian insolvency laws and towards initiating group insolvency in India. In *Walnut Packaging Private Limited v. The Sirpur Paper Mills Ltd. & Anr.*, the Court had observed that in situations where the statute provides for considering

²²ibid.

²³*Chitra Sharma & Ors. v. Union of India* (2018) 18 SCC 575.

²⁴*Bikram Chatterji & Ors. v. Union of India* 2019 SCC OnLine SC 901.

a group entity to be a single economic entity, the corporate veil can be lifted and all the companies in the company can be treated to be a single entity.²⁵

Therefore, in essence, even before the Working Group was constituted to assess the viability for introduction of group insolvency regime in India, the intention of the Adjudicating Authority and the Appellate Authority under the IBC seems to be in favour of introduction of a group insolvency regime in India.

*B. REPORT OF THE WORKING GROUP ON GROUP
INSOLVENCY*

A Working Group (“WG”) constituted by the Insolvency and Bankruptcy Board of India (“IBBI”) came out with a report in September 2019, whereby it attempted to provide a comprehensive structure regarding Group Insolvency.²⁶ This part of the paper focusses on the particulars of the report and the reasons behind the recommendations included in it.

The WG primarily considered three elements which, according to them, governed the intricacies of the insolvency of companies in a group. They were- procedural coordination mechanisms, substantive consolidation mechanisms and rules for perverse action behaviour of companies in a corporate group.²⁷ However, considering the fact that the development of ‘group insolvency’ as a concept is at a very nascent stage, the WG as a mode of trial has recommended the implementation of the framework in phases, with reforms in the procedural mechanisms constituting the first wave.²⁸

²⁵*Walnut Packaging Private Limited* (n 18).

²⁶Insolvency and Bankruptcy Board of India (n 12) 2.

²⁷Irit Mevorach, ‘Appropriate Treatment of Corporate Groups in Insolvency: A Universal View’ (2007) 8 *European Business Organisation L. REV.*179.

²⁸Insolvency and Bankruptcy Board of India (n 12) 2.

The WG also recommended that the framework should initially be applied only to companies in a domestic group, and based on its impact should be tried in cases of cross-border group insolvency.²⁹ The reason for this is that the provisions regarding cross-border insolvency are at a developing stage themselves and introducing mechanisms of group insolvency in the cross-border perspective might only hinder the process of development.³⁰

The WG noted many advantages of adopting the Framework on Group Insolvency. One of them is the exchange of information between various stakeholders to increase the possibility of resolution;³¹ one dilemma arising out of this is whether it is viable for small stakeholders to invest on *promotion of information symmetry*, when they have so little to lose.

In order to minimise the recurrence of work in various Adjudicating Authorities due to the insolvency of companies that are interlinked, the WG considers the framework on Group Insolvency which recommends a single Adjudicating Authority to overlook the insolvency of a group of companies to be more suitable and convenient by reducing costs and de-clogging the judiciary in the long run.³² But, this in turn might result in jurisdictional problems and also companies situated outside the jurisdiction of the Adjudicating Authority may be affected by this mechanism.

The WG has provided the Framework for dealing with Group Insolvency in three phases as mentioned earlier and only the procedural mechanisms are to be applied at the initial stage. In

²⁹Insolvency and Bankruptcy Board of India (n 12) 25.

³⁰ibid.

³¹Vidhi Centre for Legal Policy & EY, 'Insolvency and Bankruptcy Code: The Journey So Far and the Road Ahead' (2018) 20 <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/IBC_Thejourneyssofarandtheroadahead_Dec18.pdf> accessed 27 June 2020.

³²ibid.

drafting the Framework, the WG has taken into consideration the UNCITRAL Guidewith the aim of designing a comprehensive and wholesome framework.³³

a) Definition of corporate group

Before starting off with the three phases of implementation, the WG aimed at defining the term ‘corporate group’. While determining the definition, some stakeholders were of the opinion that the Adjudicating Authority should be given the discretion of deciding when the framework would be applicable on a case to case basis.³⁴ But the WG seems to have dismissed this claim by opining that a ‘corporate group’ should be defined such that stakeholders can determine if the framework is applicable to them, so that a case by case analysis is not necessary by the Adjudicating Authority.³⁵ In furtherance of this, the WG recommended that “a ‘corporate group’ be defined to include holding, subsidiary and associate companies”.³⁶ The WG also considered a situation whereby this definition may not include all cases where group insolvency might be apt.³⁷ In such cases, it recommended that an application be made to the Adjudicating Authority to include companies that are intrinsically linked but do not fall under the definition of ‘corporate group’ so as to maximise the value of the insolvent company without harming the assets of the company being included.³⁸

b) Procedural coordination mechanisms

³³UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency*, (2012) <<https://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf>>.

³⁴Insolvency and Bankruptcy Board of India (n 12) 28.

³⁵ibid 29.

³⁶ibid.

³⁷*Edelweiss Asset Reconstruction Company Limited* (n 21).

³⁸Insolvency and Bankruptcy Board of India (n 12) 29.

Procedural coordination mechanisms are rules which coordinate the ‘procedure’ of insolvency keeping the assets of the group separate.³⁹ This includes coordination and cooperation between courts, appointment of single insolvency representative, information- sharing negotiations, etc.⁴⁰ The adoption of procedural coordination mechanisms is recommended by the UNCITRAL Guide and World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, 2016 (“**WB Principles**”).⁴¹

Given the fact that there are a number of procedural coordination mechanisms and also taking into consideration that mandating all the mechanisms would be a herculean task, the WG has recommended that procedural coordination mechanisms such as cooperation, coordination and information- sharing should be mandatory; whereas, an option may be given to not opt for certain procedural mechanisms when they do not result in optimisation or maximisation of the assets or when it results in low cost of proceedings.⁴² Further, the WG was very clear that insolvency professionals, Committee of Creditors (“**CoC**”) and Adjudicating Authorities should be mandated to cooperate, communicate and share information with one another for better time management, lower costs and promote information symmetry; and the discretion of the extent of cooperation, communication and information sharing lies with the shareholders.⁴³

Other procedural mechanisms which were included as a part of the framework include- joint application process for insolvency of multiple companies, single Adjudicating Authority to administer

³⁹Insolvency and Bankruptcy Board of India (n 12) 31.

⁴⁰UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law* (n 33).

⁴¹World Bank, ‘Principles for Effective Insolvency and Creditor/Debtor Regimes’ (2016) Principle C 16
<<http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf>>.

⁴²Insolvency and Bankruptcy Board of India (n 12) 40.

⁴³ibid 41.

insolvency proceedings, single insolvency professional for companies in a corporate group, formation of group creditors' committee, enabling of group coordination proceedings, and extension of timeframe (180 days, extendable by 90 days).⁴⁴

These are the procedural mechanisms that the WG recommended to be included in the Framework.

c) *Perverse behaviour of companies in a corporate group*

As a mechanism to protect the rights and interests of external creditors of a group, the WG noted that there is a need to have rules to avoid perverse behaviour by group companies in order to reduce undue risks. These rules would be applicable even if a single company in a group is insolvent so as to comprehensively address issues that a company in a corporate group might face while undergoing insolvency.⁴⁵ The rules recommended to prevent perverse behaviour are- subordination claims, extension of liability, contribution orders and, avoidance of certain transactions.⁴⁶ It is to be noted that the WG considered the UNCITRAL Guide as well as the practices adopted in different countries, during the adoption of the rules.

d) *Substantive consolidation*

Substantive consolidation is the consolidation of the assets and liabilities of different group companies so that they are considered as a single part during liquidation.⁴⁷ This has already been allowed in *State Bank of India & Anr. v. Videocon Industries Ltd. & Ors.*⁴⁸ As

⁴⁴ibid 42- 48.

⁴⁵ibid 49.

⁴⁶ibid 50- 58.

⁴⁷ibid 60.

⁴⁸*State Bank of India v. Videocon Industries Ltd. & Ors* M.A 1306/ 2018 & Ors. in CP No. 02/2018 & Ors- decision dated 08.08.2019.

per the WG, substantive consolidation would result in lower costs of insolvency process, maximise the value of estates collectively for the satisfaction of creditors and stakeholders, and act as a check against fraudulent acts.⁴⁹ For substantive consolidation to be adopted, there is a requirement of an authority which determines the need for substantive consolidation. On drawing from international practice, the WG noted that any type of substantive consolidation- full, partial or deemed may be adopted.⁵⁰

The phases of prevention of perverse behaviour and substantive consolidation have been dealt in brief in this article owing to the fact that the WG has only recommended the adoption of procedural mechanisms into the framework for the time being.

On that note, the report of the WG seems to be a comprehensive one, encompassing most aspects of group insolvency. Nevertheless, there are certain challenges or concerns that arise. A few challenges which addressed in the article are: the concern arising from the definition of the term ‘corporate group’, the jurisdictional difficulties arising from the appointment of a single adjudicating authority, the non-applicability to cross- border group insolvency with the primary concern being that development of provisions related to cross- border insolvency of debtors themselves are at a very nascent stage, and the issue related to the application of principle of extension of liability in cases of group insolvency. These are quite pressing issues that need to be addressed if a comprehensive framework for Group Insolvency is sought to be adopted.

⁴⁹Insolvency and Bankruptcy Board of India (n 12) 60.

⁵⁰ibid 66.

III. CHALLENGES TO THE INTRODUCTION OF GROUP INSOLVENCY REGIME IN INDIA AND IDENTIFYING THE PROBABLE SOLUTIONS

A. *Concerns arising from the definition of ‘Corporate Group’ recommended by the WG*

One of the biggest challenges in adopting the framework on group insolvency would arise from the definition of the term ‘corporate group’. The WG considered the definition of ‘group’ in various acts and legislations in India and noted that all the definitions were made in reference to ownership and control, defined in a specific context which may not be ideal for the insolvency of group companies. In furtherance of this observation, the WG came out with a definition for the term ‘corporate group’ exclusively for the purposes of insolvency of companies in a group so as to *include holding, subsidiary and associate companies*.⁵¹ Additionally, the WG also recommended that in certain cases which do not fall under the ambit of this definition, but where application of group insolvency framework is beneficial, an application can be made to the Adjudicating Authority, who will have the power to decide if the companies in question do form a ‘group’, as long as it is shown that it will result in the maximisation of value of the insolvent company without the destruction of the value of the company being included.⁵²

The problem with the definition offered by the WG on ‘corporate group’ is that it is very vague and in essence fails to be inclusive. It also leaves a thread hanging by providing an option of approaching the Adjudicating Authority to determine to *include companies that are so intrinsically linked as to form part of a ‘group’* in cases where

⁵¹ibid 29.

⁵²ibid.

the definition fails to apply to a particular entity.⁵³ Consequently, there is a plausibility of the Adjudicating Authority being bombarded with cases seeking the inclusion of companies within the definition of ‘corporate group’. This is a situation that the WG precisely wanted to avoid, and mentioned in the report that ‘*corporate group should be defined so that stakeholders can assess ex ante if any elements of this framework could be applicable to them, without attracting litigation to determine the applicability of the framework in the first place*’.⁵⁴ It is thus necessary that a comprehensive and inclusive definition be adopted so as to ensure that there is no burden of unnecessary litigation, on the insolvent company as well as the Adjudicating Authority. Adopting a wholesome definition will also save time and be beneficial in easing the insolvency procedure.

The UNCITRAL Guide has adopted a definition on the lines of companies being interconnected on the basis of control and significant ownership; with control as “*the capacity to determine, ..., the operating and financial policies of an enterprise*”. It is to be noted that this definition considers companies having cross ownership as well as those with parents and subsidiary companies i.e., horizontal and vertical integration among companies.⁵⁵ As mentioned earlier, the definition of ‘corporate group’ provided by the WG is quite vague and doesn’t specify the inclusion of horizontally and vertically integrated companies. Only subsidiary and associate companies are mentioned in the definition- the common knowledge being that a subsidiary company is an entity separate from its holding company- thus creating a novel set of concerns in the definition recommended. One can draw a parallel from the US where the framework on group insolvency is applicable to *affiliated companies*.⁵⁶ Such a term would

⁵³ibid.

⁵⁴ibid.

⁵⁵UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law* (n 33) para 4 Glossary.

⁵⁶Federal Rules of Bankruptcy Procedure, rule 1015 (United States).

be more inclusive in nature, widening the scope of the framework, instead of individually naming entities such as “...*associate, subsidiary and holding companies*”. Hence, it is essential that a definition encompassing the vertical and horizontal interconnection among companies be adopted so as to have higher inclusivity and reduce litigation in terms of whether a company forms a part of a group or not.

Another pressing issue arising from the definition recommended by the WG is the interpretation of the term ‘commercial understanding’. This term, not having been accorded with clarity as to its meaning, may prove troublesome to the Adjudicating Authority in terms of its exposition. In addition to deciding if a company- which does not fall under the scope of the current definition- is to be included in a group, the Adjudicating Authority will have the onus of interpretation of ‘commercial understanding’. The ambiguity of the term may also result in frivolous litigation, thus hindering the insolvency process. Hence, it is suggested that a clear interpretation must be accorded to the term ‘commercial understanding’.

Lastly, certain countries such as Germany, have defined ‘corporate group’ with respect to the Centre of Main Interests (“**CoMI**”). A ‘group’ is defined on the grounds of CoMI in domestic territory along with the affiliation of companies with one another on the basis of control and common management.⁵⁷ Adopting CoMI as one of the parameters to determine the inclusion of a company in a ‘corporate group’ for the purposes of group insolvency would help in easing procedural aspects of insolvency. Additionally, it would also be beneficial in jurisdictional problems such as determining which Adjudicating Authority to approach in cases of group insolvency.

⁵⁷‘Insolvency and Restructuring in Germany – Yearbook 2019’ translated by Schultze & Braun GmbH & Co. KG, s 3e <https://www.schultzebraun.de/fileadmin/de/Fachbuecher/Insolvenzjahrbuecher/Insolvenzjahrbuch2019/Insolvency_and_Restructuring_2019_rz.pdf?_=1547820263>.

These suggestions are some ways to combat the vagueness and ambiguity projected by the definition of ‘corporate group’ recommended by the WG as it is undeniable that a more comprehensive and wholesome definition is necessary to address this concern.

B. Jurisdictional Challenges

The WG recommended that under the procedural mechanisms to be adopted in the group insolvency framework, a single Adjudicating Authority may be appointed to administer group insolvency proceedings.⁵⁸ It further opined that the Adjudicating Authority to administer the proceedings would be the one at the place where the application for insolvency was first admitted. The rationale behind this was the lowering of litigation costs, conservation of judicial resources, reduction in time for admission of proceedings and to minimize forum shopping.⁵⁹ The WG has also provided a solution in cases where an application has already been made for initiation of CIRP against group companies; where the applications need to be transferred to the Adjudicating Authority first approached.⁶⁰

The proposal to appoint a single Adjudicating Authority to administer proceedings was met with criticism by stakeholders. Some stakeholders, although being on board with the appointment of a single Adjudicating Authority, were of the opinion that the Adjudicating Authority should be the one having jurisdiction over the place where the CoMI of the corporate group lies.⁶¹ A few stakeholders were of the opinion that it would unfairly affect their interests if the insolvency applications were transferred between Adjudicating Authorities. While noting that this would indeed be

⁵⁸Insolvency and Bankruptcy Board of India (n 12) 42.

⁵⁹*ibid.*

⁶⁰*ibid* 43.

⁶¹*ibid* 42.

depreciating for the interests of the stakeholders, the WG seemingly allowed the function of more than one Adjudicating Authority with the prerequisite of exchange of information and cooperation between the Adjudicating Authorities.⁶² However, this is questionable as the WG mandates the transfer of application of proceedings, if a Committee of Creditors formed *applies for the proceedings to be administered by the first Adjudicating Authority*.⁶³ This leaves the whole process vague as on one hand the appointment of a single Adjudicating Authority seems to be mandatory, on the other hand, the stakeholders are provided with certain liberty to have different Adjudicating Authorities. Further, this freedom is nullified if the CoC formed makes an application contrary to the latter, resulting in the application of the former recommendation of having a single Adjudicating Authority.

This recommendation poses the problem of complicating the process of insolvency for various stakeholders, especially with their interests being adversely affected during the process of transfer of applications from one Adjudicating Authority to another. Though it is accepted that there is a necessity of a single Adjudicating Authority, the parameter to determine the Adjudicating Authority that administers the proceedings needs reform. Additionally, in certain cases, there must be a provision for more than one Adjudicating Authority to administer proceedings.

As mentioned earlier, a few stakeholders who were consulted opined that the Adjudicating Authority to administer proceedings be the one having jurisdiction over the place where the CoMI of the 'corporate group' lies.⁶⁴ Adopting CoMI as a parameter for the determination of the Adjudicating Authority, would help in easing the process as most of the applications for insolvency would be with the Adjudicating

⁶²ibid 43.

⁶³ibid.

⁶⁴ibid 42.

Authority having jurisdiction at the place of CoMI of the Corporate Group. This proposition can be explained with an illustration.

Illustration: Consider a ‘corporate group’ having companies A, B, C, D and E. Assuming that the CoMI of companies A, B and C is at place X, for D it is place Y and, for E it is place Z. A, B and C would hence file applications for insolvency with the Adjudicating Authority at place X.

Situation 1: Assuming that company D filed the first application for insolvency at place Y. Going by the recommendation of the WG that the Adjudicating Authority should be the one where an application was first administered, in this hypothetical situation, the Adjudicating Authority at place Y would be the Adjudicating Authority for the ‘corporate group’. This would mean that there must be transfer of applications of companies A, B, C and E to the Adjudicating Authority at Y. The only hope of the Adjudicating Authority at place X being the Adjudicating Authority for the ‘corporate group’ would be with a precondition of one of the companies- A, B or C filing the first insolvency application.

Situation 2: Assuming that the Adjudicating Authority is determined on the basis of CoMI of the corporate group. This would mean that the Adjudicating Authority at place X would be the Adjudicating Authority for the ‘corporate group’. This would result in transfer of applications of only company D and E to the Adjudicating Authority at X.

The two hypothetical situations clearly show that the adoption of CoMI as the basis for determination of Adjudicating Authority of the ‘corporate group’ would be better suited in terms of easing procedural mechanisms for both the stakeholders as well as the different Adjudicating Authorities in terms of exchange of information and cooperation. This would also help in reducing the time involved in transfer of applications as the majority of the application will already

have been filed in or will have to be filed in the Adjudicating Authority situated in the place where the CoMI of the 'corporate group' lies. In addition to this, the adoption of CoMI as a parameter would help in accommodating a more comprehensive definition as well as help in resolving cross- border challenges,

Another suggestion would be to adopt a mechanism for the determination of Adjudicating Authority on the lines of the German system. The German legislation mandates a single court to administer insolvency proceedings, the court being the one where the first application of insolvency was filed by one of the companies of the group. However, the provision allows for the concentration of proceedings in more than one court in cases where the company that first filed the insolvency application employs less than '*15% of the group's employees and its revenue is either 15% less than the revenue of the group or its worth is less than 15% of the balance sheet of the group*'.⁶⁵ This is another solution of easing the procedural process for both the stakeholders as well as the Adjudicating Authorities if the WG is adamant on the parameter of the place where the application is first filed being the basis for the determination of the Adjudicating Authority.

It is thus suggested that reforms along the lines of either adopting CoMI for the adoption of Adjudicating Authority or the provision to have more than one Adjudicating Authority in certain cases as provided in the German system would be an efficacious mechanism in easing the procedural coordination mechanisms to be adopted in the Framework recommended by the WG.

C. Cross Border Insolvency and Group Proceedings

With increased globalisation, the presence of multinational corporations and Foreign Direct Investment has exponentially risen in

⁶⁵Insolvency and Restructuring in Germany- Yearbook 2019 (n 57).

India over the past few years. Due to the presence of these corporations over various jurisdictions, a major problem arises when such multinational corporates turn insolvent, and such circumstances warrant the need for an efficient cross border insolvency regime. Further, most of these multinational companies carry out their operations through various subsidiary companies and hence they are generally present as cross border group companies. Thus, cumulatively, group insolvency proceedings are highly related to the cross-border insolvency provisions and surprisingly, the Indian jurisprudence on both these aspects of insolvency law is still uncertain.

Cross border insolvency refers to the situations and circumstances in which a corporate debtor has its assets and/or the creditors in more than one country. This definition of cross border insolvency essentially highlights three situations involved in cross border insolvency:

- a. Foreign creditors willing to file insolvency proceedings against Indian corporate debtors⁶⁶
- b. The corporate debtor may have its operations in more than one country⁶⁷ or
- c. Insolvency proceedings are initiated against the same corporate debtor in other jurisdictions.⁶⁸

In context of Indian jurisprudence in relation to cross border insolvency, the first situation as abovementioned is properly settled as the definition of ‘person’ under the IBC, 2016 includes residents

⁶⁶Aparna Ravi, ‘Filling in the Gaps in the Insolvency and Bankruptcy Code – Cross Border Insolvency’ (*India Corp Law*, 17 May 2016) <<https://indiacorplaw.in/2016/05/filling-in-gaps-in-insolvency-and.html>> accessed 27 June 2020.

⁶⁷ibid.

⁶⁸ibid.

outside India.⁶⁹ Since no discrimination is made between resident and foreign creditors under the Code, foreign creditors can approach the Indian Adjudicating Authorities for initiation of insolvency proceedings. In relation to the other two situations, Section 234 of the IBC, 2016 provides the Central Government the right to enter into an agreement with foreign countries for enforcement of the provisions of the IBC.⁷⁰ Further, Section 235 of IBC, 2016 provides that the Adjudicatory Authority may issue a letter of request to other foreign authorities if any reciprocal agreement is made with the respective foreign governments under Section 234 of IBC, 2016.⁷¹

IBC, 2016 is still in a nascent stage and is evolving extensively. The Insolvency Law Committee on Cross Border Insolvency in reference to Sections 234 and 235 of the IBC, 2016 observed that these provisions were inefficient, time consuming and uncertain for the creditors.⁷² Thus, there was a dire need to revamp the cross-border insolvency provisions in India. Taking into consideration the increasing number of multi-national companies in India along with exponential rise of Foreign Direct Investment in India, the Insolvency Law Committee on Cross Border Insolvency proposed to implement the UNICTRAL Model Law on Cross-Border Insolvency (Model Law) with a few modifications in specific implementation of the Model Law in relation to IBC, 2016.⁷³

One of the major issues related to cross border insolvency is the determination of the CoMI. As per the Model Law, the main insolvency proceedings against a corporate debtor can be started only in the jurisdiction in which the debtor has its CoMI and non-main proceedings may be started at any jurisdiction, even if the debtor's

⁶⁹Insolvency & Bankruptcy Code 2016, s 3(23) (India).

⁷⁰ibid s 234.

⁷¹ibid s 235.

⁷²Insolvency and Bankruptcy Board of India (n 12) 12- 13.

⁷³ibid.

CoMI does not lie therein.⁷⁴ The definition and meaning of CoMI is not present in the Model Law which has led to various debates in foreign jurisdictions in reference to initiation of cross border insolvencies. The importance of CoMI lies in the purpose of the Model Law itself wherein it is observed that the proceeding pending in the debtor's CoMI is of prime importance for managing the insolvency irrespective of its presence in the other States.⁷⁵ The need to identify the proper jurisdiction and CoMI for the enterprises increases in cases of group insolvencies altogether as it involves various companies which may tend to have their CoMI in different jurisdictions.

In specific reference to India, Clause 14 of the Draft Part Z of the Report of Insolvency Law Committee on Cross Border Insolvency provides that CoMI of a corporate debtor lies at the place of its registered office unless a proof to the contrary is provided.⁷⁶ At the same time, the Adjudicating Authority may also conduct an assessment to ensure that the debtor's central administration takes place at the CoMI and is easily identified by the creditors and the other third parties⁷⁷, and if the CoMI is still not determined, it may be done through an assessment as laid down by the Central Government.⁷⁸ Prima facie, the exercise of finding the CoMI of a single corporate debtor seems to be feasible and practical in light of

⁷⁴United Nations Conference on International Trade Law, *UNICTRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, Article 17 (Vienna: United Nations, 2014) 9 <<https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>> accessed June 23 2020.

⁷⁵ibid.

⁷⁶Ministry of Corporate Affairs, Government of India, 'Report of Insolvency Law Committee on Cross Border Insolvency' (16 October 2018) 57 Draft Part Z, Clause 14 <https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf>.

⁷⁷ibid.

⁷⁸ibid.

the aforementioned draft provisions. However, in cases of group insolvencies, each company within the group may have its own registered office in different jurisdictions and thus in such cases, the exercise of finding CoMI for the group enterprise will not be feasible in the manner provided for in Draft Part Z.

Though initiation of insolvency proceedings in various states against each corporate debtor is possible, it must be noted that it is beneficial for the different proceedings of the same group company to be supervised and coordinated from as single jurisdiction.⁷⁹ This supervision ensures faster resolution, non-opposing decisions and easy implementation of foreign decisions within the domestic territory.

Three major issues arise in the light of identifying the CoMI for group insolvency matters based on the 'registered office test'. Firstly, not all group companies can be expected to have their registered offices within the same jurisdiction as it would defeat the purpose of expansion of the group companies. Secondly, it becomes extremely difficult for the creditors to ascertain the CoMI of various enterprises within a group of companies as it is itself uncertain in nature. Lastly, the jurisdictional arguments for group companies and their CoMI may lead to the issue of forum shopping.

Instead of the 'registered office test', the 'head office test' should be relied upon for identifying the CoMI for a group insolvency proceeding. Indeed, the company's main place of business is the one wherein the major decisions regarding the general management of the parent company as well as its subsidiaries are taken and central administration is exercised.⁸⁰ This test is an efficient one to identify the CoMI for the group insolvency matters as it can match creditor's

⁷⁹I Mevorach, 'The road to a suitable and comprehensive global approach to insolvencies within multinational corporate groups' [2006] 15 JBLP 455, 463-64.

⁸⁰*Planzer Luxembourg Sarl v. Bundeszentralamt fur Steuern* [2007] ECJ, C-73/06.

legitimate expectations, provided that disclosure of such information is made available by the companies.⁸¹

However, in cases where such ‘head office test’ cannot be applied to find the CoMI for group insolvency due to the absence of a single head and brain of the entire group of companies, greater consideration may be given to the place where more assets of the group companies are placed, the legitimate expectations of the creditors, the place of registered office etc. so as to find the CoMI for the group insolvency proceedings.

D. *Extension of Liability and Group Insolvency*

As a general practice, the subsidiary companies and the parent company are considered to be a separate legal entity and at the same time, the directors and the other key personnel managers of the company are also considered to be separate from the corporate entity. However, in *Life Insurance Corporation Limited v. Escorts Ltd. & Ors.*⁸² the Supreme Court observed that the corporate veil between a subsidiary company and a parent company can be lifted in cases of fraud, improper conduct, evasion of tax or any other wrong committed as per a statute. The Courts generally pierce the corporate veils of the parent company as well as the subsidiary company so as to see as to whether the parent company and the subsidiary company are guided by the same head and brain, that is, if the persons in charge of the parent company and the subsidiary company are same or not.⁸³

The abovementioned judicial decisions, point towards the established principle of law that in cases where the parent company and the subsidiary company are intrinsically connected with each other, the

⁸¹Irit Mevorarach, ‘The ‘Home Country’ of a Multinational Enterprise Group Facing Insolvency’ (2008) 57(2) ICLQ 427, 435.

⁸²*Life Insurance Corporation Limited v. Escorts Ltd. & Ors* AIR 1986 SC 1370.

⁸³*Hackridge-Hewettic & Esaun Ltd. v. G.E.C. Distribution Transformers Ltd.* (1992) 74 Comp Cas 543 (Mad).

corporate veil can be lifted and the parent company can be held liable for the illegal act of the subsidiary company. On similar lines, in circumstances where the directors of a parent company have a high level of control over the subsidiary companies and indeed act as *de facto* directors for the subsidiary company, then the Courts may lift the corporate veil of a subsidiary company and also hold the directors personally liable for the illegal acts of a subsidiary company. In essence, this is known as the principle of extension of liability as the liability of a subsidiary company is extended to the parent company as well as the key personnel of the parent company.

The application of the principle of extension of liability is not settled as far as the Indian group insolvency jurisprudence is concerned. The WG in its Report mentioned that there was no need to introduce any provision in IBC, 2016 for the purpose of extending liability to the parent companies and the directors.⁸⁴ The WG noted that Section 2(60) of the Companies Act, 2013 defines an officer in default as “*any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity.*”⁸⁵ Thus, the WG observed that this definition of an officer in default provides sufficient scope to include *de facto* or shadow directors of parent companies to be held responsible for fraudulent acts related to the insolvency of a subsidiary company.

However, by making the aforementioned observation, the WG has not provided sufficient clarity to the Adjudicating Authority so as to deal with cases related to shadow or *de facto* directors’ default in relation to the group insolvency proceedings involving a subsidiary company. While arriving at this recommendation, the WG seems to have overlooked a few of observations which necessitate the need for

⁸⁴Insolvency and Bankruptcy Board of India (n 12) 60.

⁸⁵Companies Act 2013, s 2(30) (India).

having explicit provisions in the IBC for the purpose of application of the principle of extension of liability. Firstly, the WG itself noted the intention of the stakeholders to extend liability on the shadow directors in a few circumstances wherein the fraud conducted by the shadow directors and the parent company are apparent.⁸⁶ Secondly, the UNICTRAL Guide itself recommends a few factors to be taken into consideration while dealing with cases related to certain transactions between group companies such as relationship between the parties, integration of the two transacting parties, purpose of transaction, etc.⁸⁷

Having a provision punishing a *de facto* or a shadow director personally for his wrongdoings through a subsidiary company should not create a fear within the corporates. The application of this principle has to be limited in nature with a proper note of caution. The liability should be extended only on the basis of duties that a parent company and the directors of the parent company have with the subsidiary company.⁸⁸ The application of the principle is to be based on certain factors which are generally identified by the statute that governs the insolvency proceeding between the group companies.

The factors on the basis of which the liability may be extended upon the parent company or the shadow or *de facto* directors, unless identified and given explicit recognition in the IBC, 2016 would create a dilemma within the Adjudicating Authorities and may lead to contradictory decisions in different matters. To avoid any unwelcoming consequences in the Indian jurisprudence related to

⁸⁶Insolvency and Bankruptcy Board of India (n 12) 56.

⁸⁷United Nations Conference on International Trade Law, *UNICTRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (n 74).

⁸⁸Gwynne Skinner, 'Parent Company Accountability Ensuring Justice for Human Rights Violations' (The International Corporate Accountability Roundtable, 01 November 2015)

<<http://www.bhrinlaw.org/documents/pcap-report-2015.pdf>> accessed 30 June 2020.

principle of extension of liability in group insolvency proceedings, there is a dire need to provide explicit provisions in IBC, 2016 in this regard, contrary to the recommendation made by the WG in its report in reference to the need for a provision in relation to the extension of liability.

IV. CONCLUSION: THE FINAL REMARKS

Being a relatively young legislation, the IBC has seen a number of amendments in recent years. The current recommendation to include a framework on group insolvency has given rise to a few grappling questions which the authors have highlighted in the article.

The WG set by the IBBI has come up with a number of recommendations and suggestions in the furtherance of adaptation of such a framework. It recommended that the framework on group insolvency ideally deals with three areas namely, procedural coordination mechanisms, substantive consolidation and rules against perverse behaviour. Out of these three, the WG suggested only the adoption of procedural coordination mechanisms as a trial mechanism. From a number of procedural mechanisms suggested, only cooperation, coordination and sharing of information has been mandated by the WG to be adopted. In addition to these recommendations, it has also provided a definition for the term ‘corporate group’ for the purposes of application of the framework.

Analysing the recommendations of the WG, the authors have identified certain concerns in the framework which are, i) concerns due to the vagueness surrounding the definition of ‘corporate group’, ii) jurisdictional issues arising due to the recommendation of a single Adjudicating Authority to monitor the group insolvency process, iii) with respect to the cross- border aspects of group insolvency and, iv) extension of liability in the group proceedings. In addition to

highlighting the concerns revolving around these challenges, the authors have suggested plausible solutions for the same.

First, for the problems that may arise due to the ambiguity in definition of corporate group, it is suggested that the definition inclusive of the vertical and horizontal interconnection among companies or a definition on the grounds of CoMI should be adopted to make the definition comprehensive and wholesome. Second, considering CoMI of the ‘corporate group’ for the determination of Adjudicating Authority or, the provision to have more than one Adjudicating Authority in certain cases as provided in certain foreign legislations would be an effective method to protect the interests of the stakeholders of the ‘corporate group. Third, the ‘head office test’ instead of the ‘registered office test’, should be adopted to identify the CoMI for a group insolvency proceeding as it is more effectual in equalling the legitimate expectations of a creditor. Lastly, there is a pressing requirement of provisions with respect to principle of extension of liability in group insolvency proceedings in order to protect corporates from unwarranted outcomes.

After contemplating on the above concerns and attempting to offer certain propositions to the same, the authors have embraced the view that the framework suggested by the WG is comprehensive and inclusive to a large extent. However, it needs reform in order to holistically supplement group insolvency proceedings as well as the IBC in general.