



**PROCEDURAL AND SUBSTANTIVE
ASPECTS OF
GROUP INSOLVENCY: LEARNINGS
FROM PRACTICAL EXPERIENCES**

Study By
Indian Institute of Insolvency Professionals of ICAI (IIPI)



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PREFACE

The working group constituted by Indian Institute of Insolvency Professionals of ICAI (IIIPi), on the subject of ‘Procedural and Substantive Aspects of Group Insolvency: Learnings from Practical Experiences’ is pleased to present this study to the regulator(s) and other stakeholders.

The working group has attempted to develop a comprehensive understanding on the subject after elaborate consultation intra-group and with other professionals/ stakeholders. The group has kept in reference for its work, the report of the group constituted by IBBI in 2019. This group has focused on recent experiences from the jurisprudence pertaining to group insolvency besides drawing lessons from international territories particularly Asian economies. Moreover, the group has attempted to examine all relevant issues and challenges in the context of group insolvency in India. This study would help preparing the insolvency professionals and stakeholders better to manage CIRPs with group insolvency features, besides providing inputs to regulator for policy interventions.

The working group constituted for the purpose, consisted of members with rich experience in managing CIRPs especially involving group linkages. Given the multi-faceted aspects involved, and to have the focused approach, the group was further divided into three small sub-groups covering different aspects of research/study. Multiple consultative rounds of discussions across sub-groups and the larger group took place for the well-rounded discussions and recommendations.

The group relied on feedback from Insolvency Professionals (IPs) through a structured questionnaire that was distributed by the IIIPi across IPs. The group members relied on their personal experience and reached out to other experienced IPs personally to determine the challenges they faced. Finally, a group session was conducted by IIIPi with several IPs having experience in Group Insolvency. Moreover, secondary research by the sub-group members comprised of judicial pronouncements as well commentaries by legal experts.

Considering that the IBBI WG had already evaluated practices on group insolvency in European countries and United States, the group analyzed the practices on Group Insolvency in other Asian countries where there are similarities the way corporate structures operate in India, which are mostly managed directly or indirectly by promoters themselves.

The comparison of law and practice across various international jurisdictions, predominantly Asian countries, practical experience/learnings from group insolvency in case of a real estate company and important observations in legal pronouncements are also provided in the annexures to this report.

The working group is thankful to IIPCI for providing an opportunity to develop the knowhow as above and strengthen the IBC framework. In addition, the group expresses gratitude to several other professionals including experienced IPs, legal experts and other professionals who have contributed directly and indirectly to the development of this research report.

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PART-1 BACKGROUND

With advent of Insolvency and Bankruptcy Code (IBC) in 2016, considered to be a beneficial legislation and as one of the major economic reforms, the landscape of 'Ease of Doing Business' has significantly improved in India.



Besides the stated objectives of value maximization, promoting entrepreneurship, availability of credit and balancing interests of various stakeholders, the code has successfully brought about desirable behavioral changes among the debtors. The value maximization principle requires that once an entity is identified with distress as manifested in its default, an urgent

and immediate action be taken to resolve it, as enshrined in IBC. The timely action is imperative to avoid further deterioration in the underlying value, either through change in management or sale as going concern.

Continuity of business is the first and foremost objective towards preservation of capital and value of underlying assets. The reliability and efficacy of the 'corporate insolvency resolution process' (CIRP) especially as a resolution

rather than recovery mechanism, depends inter-alia, on the adherence to the prescribed timelines.

IBC puts the primary

responsibility of diligent pursuance of time-bound processes on insolvency professionals and committee of creditors (COC) supported by the adjudicating/appellate authorities.

“ Timely action is imperative to avoid further deterioration in the underlying value of CD, either through change in management or sale as Going Concern ”

Though insolvency law is still evolving in India, successful implementation of resolution framework has already been witnessed for the categories of corporate debtors (CD) In the context of any CIRP, the simplest form could

involve single or stand-alone company with no inter-corporate linkages in terms of control or ownership. However, on the other end of spectrum, there may be companies having multiple inter-corporate linkages, through holding/subsidiary/joint-venture routes of intricate ownership; business, or financial linkages. Managing insolvency of one or more of such inter-connected company(ies), would require a different dispensation from the one prescribed in IBC currently.

In the landmark ruling in *Salomon v. A Salomon & Co. Ltd. (1897)*, UK's House of Lords recognized a company's separate juristic personality, which remains the basis for modern corporate law. The ruling drew a corporate veil around the legal personality of the company thereby establishing the separate legal identity of a corporate. Jurisdictions in most part of the world have recognized separate legal entity for the purpose of insolvency. The separate juristic personality of corporates is well accepted in India also even though exceptions based on case laws and legislation have been incorporated over the years. However, in the event of insolvency, such corporate veil may need to be lifted for effective consolidation of business interests in furtherance of timely resolution and value maximization objectives.

1.1 IBBI Working Group on Group Insolvency

The Insolvency and Bankruptcy Board of India (IBBI), recognizing the growing need for a framework on group insolvency, set up a Working Group on Group Insolvency (WG)

in January 2019, under the Chairmanship of Shri UK Sinha, which submitted its report in September 2019. In its report, the WG has highlighted principles which would be likely to govern the corporate group insolvency regulatory framework (CIRP). The WG recognized the imperativeness of the group insolvency regulations for ensuring:

- i. Value maximization of the group entities,
- ii. Avoid multiple insolvency proceedings,
- iii. Reduce information asymmetry and related costs, and
- iv. Increase certainty for stakeholders in the insolvency of the group.



The key observations and recommendations of the above WG are captured in following paras.

It envisaged an enabling group insolvency framework, to be implemented in a phased manner. The first phase may facilitate procedural co-ordination of only companies in domestic groups. 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 felt need at the relevant time. While it would be voluntary for the stakeholders of the company in distress to use the framework, the provisions relating to communication, cooperation and information sharing between Insolvency Professionals, Committee of Creditors and Adjudicating Authorities is proposed to be made mandatory for the companies which belong to a group and have been admitted into corporate insolvency resolution process.

In the absence of special treaties with other countries, the proposed group insolvency framework can only be limited to local Indian groups and local Indian entities of the group. This is a serious gap, when foreign investors are being invited to participate and purchase stressed assets.

“ A definition of group should be provided, so that a case-by-case analysis need not be made to assess the applicability of the framework. ”

A definition of group should be provided, so that a case-by-case analysis need not be made to assess the applicability of the framework. Moreover, this framework be made applicable to a ‘corporate group’ that is defined to include holding, subsidiary and associate companies.

An application may be made to the Adjudicating Authority to include companies that are so intrinsically linked as to form part of a ‘group’ in commercial understanding, but are not covered by the definitions above, as long as it can be demonstrated that this will result in maximization of value of the insolvent company without destroying the value of the company being included, so that there is overall value maximization.

Definition of Group, which essentially factors in only insolvent company should be brought in purview of definition of Group for the purpose of applicability of Framework.

Procedural coordination mechanisms are only to be applicable to those companies in a group against whom insolvency proceedings can be initiated. This means that companies that have not committed default, or companies that are not covered under the Code, cannot be covered under procedural coordination mechanisms.

More evidence may be required to build a case that group structures routinely include other forms of entities such as partnerships and trusts, and a separate analysis may have to be carried out to determine how a framework dealing with the insolvency of these entities in a group, which is outside the mandate of this WG. Consequently, corporate group has been defined only in respect of companies, and not all corporate debtors, which could have included limited liability partnerships and other body corporates as well.

Further, the WG examined international best practices including UNCITRAL recommendations and had extensively drawn references from western legislation in European countries and United States.



PART-2

PURPOSE OF STUDY ON GROUP INSOLVENCY

Group insolvency framework deals with the insolvency of the entities which are part of the same corporate group and are interdependent with respect to their economic viability or functioning. Such framework can consolidate the entire group into single entity or can prescribe for cooperation and coordination among different entities under insolvency, called substantive or procedural consolidation, respectively. Procedural consolidation is in fact a procedural coordination whereby resolution or liquidation process of different (but connected) entities are put under a common procedure. Whereas in case of substantive consolidation, the assets, and liabilities of distinct (but connected) entities are pooled together for the purpose of their resolution or liquidation process.



Presently, the Insolvency and Bankruptcy Code, 2016 (IBC) does not provide for an arrangement to consolidate (procedurally or substantively) insolvency proceedings of corporate debtors

“Procedural consolidation is in fact a procedural coordination whereby resolution or liquidation process of different (but connected) entities are put under a common procedure.”

within the same group. However, the Adjudicating Authorities (AA) have started actively considering this possibility and passed orders taking into consideration interconnections of the corporate debtors with other group companies. Prominent cases that highlighted the need to lift the corporate veil for group entities in certain situations and regulate the insolvency of groups include the IL&FS Group, which involves 169 group entities, Videocon group, Adhunik group, Sachet Infrastructure, Amtek Auto, Jaypee group, etc.

In the above backdrop, the need was felt to commission this working group to:

- i. Examine all relevant issues and challenges in the context of group insolvency in India,
- ii. Peruse recent developments and case laws under IBC, especially after the report on the subject by the IBBI WG in September 2019,
- iii. Draw lessons from international experiences, especially other Asian jurisdictions having similar interconnected corporate structures, and
- iv. Help preparing the insolvency professionals and stakeholders to manage CIRPs with group insolvency features, besides providing inputs to regulator for policy interventions.



PART-3

FINDINGS/OBSERVATIONS

The findings/observations of the working group have been summarized across four heads, as follows.

3.1 Group Insolvency Approach: Desirability in Indian Context

It is commonly experienced that a significant percentage of Indian businesses comprise of interlinked group entities which operate as a single economic unit. A World Bank Report states that India ranked 20th out of 190 jurisdictions, on the related party transaction index. It is a widespread business practice for group entities to regularly engage in related party transactions such as inter-corporate loans, cross collateralization, and significant influence arrangements. While such structures largely respect the separate legal status of the group companies, practice suggests such interlinkages in business, operations and management often raise significant challenges when individual group entities become insolvent.



Companies belonging to the same group may also be linked either operationally in terms of dependence for the supply of raw material, or financially in terms of inter-corporate deposits or guarantees. Recognizing these inter-linkages is time-consuming and expensive when the insolvency of each group company is dealt with in isolation. Further, the value of

assets realized can be maximized if the inter-linked companies are offered for bidding/resolution together. There could be a reduction in the asymmetry of information between the different creditors and the promoters. Moreover, the nature of transactions between different groups may itself have relevance to the insolvency proceeding.

There are several cases where the Corporate Debtor (CD) undergoing insolvency proceedings (CIRP) has business models that are inextricably linked

to other sister / subsidiary / parent companies. In such cases, the objectives of the IBC have not been realized in full due to absence of framework in law for bringing the defaulting groups companies under the same CIRP. Following are few of instances:

- a. **KSK Mahanadi Power Company Limited:** Applications under IBC were moved separately along with its two subsidiaries having water and rail infrastructure respectively for exclusive use of the holding company, despite their inter-connected business model. The holding company was admitted into insolvency on 3rd October 2019, but its two subsidiaries were admitted for resolution only after 15 months on 1st January 2021 on the direction of Hon’ble Appellate Tribunal intervened. Consolidation applications for the aforesaid three corporate debtors have also been filed and are yet to be disposed of. This has led to significant delay in the resolution as the assets are divided into three companies. Resolving through different CIRP proceedings shall dent value maximization object.
- b. Bhushan Steel and Bhushan Energy were two separate insolvency proceedings despite their strong inter-connectedness.
- c. While Jet Airways is undergoing CIRP, its subsidiary Jet Lite which had business linkages with Jet Airways and was under common management/ control is left isolated. There were significant cross-border considerations also as some of the business assets were in Netherlands and even in the absence of notified cross boarder regulations, coordination protocol was agreed between the RP of Jet Airways and Dutch Administrator.
- d. Monnet Ispat & Energy Limited and its subsidiary Monnet Power Company Limited were admitted separately for resolution. While Monnet Ispat was resolved, Monnet Power is facing liquidation proceedings and struggling to identify a bidder even three years after its admission into CIRP resulting in value destruction while most of the financial creditors were common.
- e. **Adhunik Group of Companies:** Four separate CIRP processes were pursued for four group companies. No joint application for substantive

“Resolving through different CIRP proceedings shall dent value maximization object.”

consolidation could be moved in absence of legal framework. Despite the same AA and same RP, and 80% commonality amongst CoC members, significant efforts were involved in aligning the COC members and its completion. However, it is a classic example of procedural coordination and its benefits.

3.2 Group Insolvency Approach: Recent Experience and Jurisprudence in India



Recent experiences and jurisprudence with respect to insolvency proceedings in India as indicated below, have provided better insights into inter-group linkages highlighting the need to have a group insolvency framework:

- i. Where business of parent / subsidiary / sister companies is inextricably linked. Any one of these companies does not have a sustainable business model without the other for instance in case of Videocon Industries, Lavasa Corporation.
- ii. Where the group structure of CD involves multiple entities to overcome regulatory and / or other such restrictions. For instance, real estate companies typically use subsidiaries / SPVs to get around restrictions of Urban Land Ceiling. In case of IREO Five Rivers Private Limited real estate group, only the main company was admitted to CIRP whereas there were ten more companies which held the land parcels.
- iii. Where the structures are devised to maximize bank borrowings, usually by unscrupulous promoters which can also be used to divide and hide assets.
- iv. Where the companies have operations across different countries/ geographies. Legal and operational requirements force setting up of local subsidiaries / companies, for instance Jet Airways.

To appreciate the subject further, few of such cases have been analyzed in brief, as follows:

A. Videocon Group¹

National Company Law Tribunal, Mumbai (NCLT), on appeal by the Chairman of the Corporate Debtor group, allowed consolidation of insolvency proceedings



for 13 Videocon Group entities. NCLT, while allowing consolidation, relied upon precedents in UK and the US. Commonality of debt repayment obligations, management, assets, liabilities, and interlacing financial structure were cited as the grounds for its decision. Substantive consolidation of the group entities

solely for the purpose of insolvency process was allowed for:

- a. Consolidation into a single insolvency resolution process
- b. Consolidation of assets and liabilities
- c. Elimination of intra-company debts
- d. Pooling of individual guarantees given by group companies
- e. Constitution of a common Committee of Creditors and appointment of a common resolution professional with a common insolvency commencement date

However, the two group entities which had a strong case of functioning and paying back dues to the lenders independently and did not have any operational dependence on the other group entities, were kept out of consolidation. That indicates the adjudicating authority are inclined to approve substantive consolidation of insolvency proceedings on a discretionary case by case basis.

B. Lavasa Corporation Ltd (LCL) / Warasgaon Assets Maintenance Ltd (WAML) / Daswe Convention Centre Ltd (DCCL)²

NCLT Mumbai, on appeal from the creditors of the three entities, allowed consolidation of the separate insolvency proceedings of LCL, WAML and DCCL.

¹https://nclt.gov.in/sites/default/files/Feb-final-orders-pdf/State%20Bank%20of%20India%20MA%202385%20of%202020%20in%20CP%28IB%29-02_2018%20NCLT%20ON%2012.02.2020%20FINAL.pdf

Warasgaon Power Supply Limited and Dasve Retail Limited, the other two fully owned subsidiaries of LCL, though not under CIRP, also agreed to resolve their debts as part of the consolidated resolution plan for LCL.

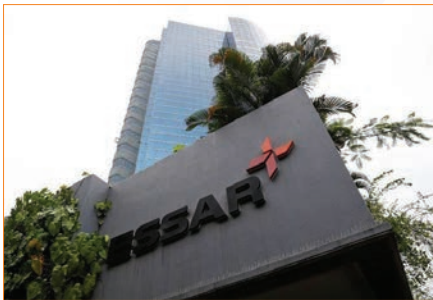


The key points taken into consideration by the NCLT to allow consolidation were:

- a. Due to the interlinkage of business model and operations, stand-alone resolution for any of the three entities did not appear to be possible.
- b. The value of the resolution could only be maximized if the three were considered together rather than as separate entities.
- c. The NCLT drew parallels with the Videocon consolidation with the criteria of common control, directors, financial creditors, assets and liabilities; inter-dependence and inter-lacing of finance, intricate links and inter-twined accounts of the subsidiaries.

C. Essar Steel India Ltd. (ESIL)

Essar Steel India Ltd (ESIL)'s operations were interconnected with a number of group entities for providing various services viz., port, power, shipping, etc. These group companies were set up for regulatory reasons and had arms' length contractual arrangements approved by lenders.



During the CIRP process of ESIL, group insolvency was not a preferred option due to following reasons:

- a. Many of the group companies had different set of lenders resulting in delays in reaching consensus, issues in distribution of resolution proceeds, etc.
- b. Quite a few group companies were standard accounts in the books of lenders. Dragging of these companies into insolvency would have

²NCLT Mumbai MA 3664/2019 in C.P.(IB)-1765, 1757 & 574/MB/2018 decided on 26.02.2020

resulted in not receiving any payment, accounts becoming NPA and making significant provisions by lenders. Moreover, it would have resulted in litigations as each entity is also a separate legal entity with different set of shareholders.

- c. Contractual arrangement for supply of services, which were adhered to.

During CIRP, operations were carried out as per the contractual arrangements and no disruption was faced and therefore acquirer was comfortable acquiring ESIL on stand-alone basis. Post-CIRP, the acquirer has acquired a few group companies on commercial basis.

Hence, group insolvency may succeed wherein common set of lenders are there and other companies are eligible to be taken into insolvency instead of standalone resolution.

D. IREO Five Rivers Private Limited

The CD under CIRP was just holding joint development agreements (JDAs) with ten land-holding companies. CD had transferred funds to some of these companies as inter-corporate deposits (ICDs) who in turn bought agriculture land from farmers and applied to the Director Town and Country Planning (DTCP) for the license to develop it as residential colony. JDA was executed between the land-owning license-holding companies and the CD, which authorised the CD to develop residential colony and to sell the same. There was no default by the ten land owning companies, but seventy five percent of the land was mortgaged to the two financial creditors of the CD. The prospective resolution applicants, after deliberations with RP and CoC submitted the Resolution plan for the CD and the ten land owning companies, which was approved by the CoC.



Now the plan is before the Hon'ble NCLT Chandigarh Bench for approval.

To appreciate the nuances including specific circumstance of this case, factors/ rationale for consolidation, challenges faced during the process and key

learnings, have been detailed in the **Annexure-I**.

Moreover, The important observations as highlighted in some of the legal pronouncements in cases having features of Group insolvency, have been provided in the **Annexure-II**.

3.3 Constraints and Challenges in Group Insolvency



Apart from the legal issues, the stakeholders face different constraints and challenges while dealing with CIRPs having group linkages/features, in their pursuit to maximize value within the prescribed time frame. Such challenges have been examined under five broad heads as follows:

3.3.1 Related to Lenders: Managing any group CIRP becomes almost impossible unless all lenders are aligned. Even having sub-groups of the same lenders (e.g. some consortium banks of the parent who funded some of the subsidiaries / sister companies) can create problems. The problems usually arise due to:

- a. Cross linkages (business/services/materials), group lending and advances/ borrowings and other related party transactions.
- b. Expense allocation in case of shared resources / management / head office expenses.
- c. Corporate guarantees / covers given by parent for loans to subsidiaries usually result in double counting under claims.
- d. Lenders wanting to maximize value from each of their CDs – which may adversely impact other company valuations/recovery.
- e. Conducting and keeping track of multiple CIRPs which are closely related – communication, claims, double counting, attendance, different RPs / AAs, lawyers, service providers, administration.
- f. Determining the right valuation becomes an issue without proper consolidation and considering impact of supply / service contract.

3.3.2 Related to Resolution Applicants (RA): Any RA would prefer to maximize its value from the bid by ensuring that they get control of the entire business end-to-end. In separate CIRPs, they must submit separate plans which increases cost, compliance, and effort. Even if the RA submits such multiple plans, there is no certainty that the same RA will be the winner in all the CIRPs e.g. RA may have the best plan for ‘Parent CD’, but not the best for ‘Subsidiary CD’. Since independent CoCs will take a commercial / legal call, they will go for best in each category. Should the RA win only one of the CDs, they may not be willing to go through the process given lack of crucial supply-chain linkage from the sister concern. The resolution of Lavasa / Warasgaon AML faced the same issues as any applicant found it difficult to consistently be the best plan for both the CDs.

“ Even if the RA submits such multiple plans, there is no certainty that the same RA will be the winner in all the CIRPs. ”

3.3.3 Related to Adjudicating Authority (AA): Given the current regulations, application filing take place across different jurisdictions depending on registered office. Even if it is in the same jurisdiction, it may be in different benches and on different dates depending upon the applicants. e.g. KSK Mahanadi, Warasgaon AML. The AA will not be able to appreciate the complete picture of the business and legal issues of different companies. For instance, in case of Lavasa Corporation and Warasgaon AML, CIRP of a parent and subsidiary, with inextricable businesses, were admitted in different benches of the same court. Lenders to the subsidiary were a subset of the lenders to the parent. While the parent was able to convince the AA of proceeding towards consolidation, the subsidiary business model forced the AA to order liquidation.

3.3.4 Related to Resolution Professionals (RPs): In absence of consolidated approach, RPs may be different for parent and subsidiary. Each RP will work towards maximizing the value for stakeholders in the context of his/her CD/CIRP and may not be keen to give way to promote group consolidation. Sharing of information freely brings confidentiality issues but not sharing causes delays and wrong decisions. Running business is complicated and often, RPs get into claims and counter claims with each other, especially in case of parent company guarantees. Coordinating CoC meetings is tough and most decisions are delayed as proceedings

of one will determine the outcome in the other. In case of large groups, RPs are also constrained by the regulatory limitation on number of cases an RP should handle at a time.

3.3.5 Nature of Insolvency Proceeding: Process and outcome of an insolvency proceeding would to a large extent depend upon its inherent nature, that is to say, whether both parent and subsidiary(ies) are under CIRP, or if only one of these is under CIRP, or some of them are under CIRP while other(s) are not. The inter-linkages of lenders, debtors and employees may also impact the ease of consolidation. The law prohibits take-over of assets of subsidiaries by RP of parent under CIRP but there have been cases where an apparently healthy company is being pushed into CIRP due to sister/parent coming under CIRP.

3.3.6 Additional Costs and Delays: In addition to administrative or coordination issues, avoidable costs and delays are incurred in managing group insolvency process, for want of a framework, indicated below:

- a. Cost of each additional RP when the whole group can be handled by one RP.
- b. Additional cost and delays in arranging valuers, filings, court fees, separate lawyers, CoC meeting administration, venues, filing of more minutes / progress reports / CIRP MIS reports.
- c. Additional cost and delays in multiple public announcements, EOI / RFRP publications, separate Data Rooms, plan evaluations, approvals etc.
- d. Additional cost and delays on account of multiple NCLT proceedings and other litigation.

In case of large groups, RPs are also constrained by the regulatory limitation on number of cases an RP should handle at a time.

3.4. Practice across International Jurisdictions in Asian countries

Every Jurisdiction in most part of the world has recognized separate legal entity for the purpose of insolvency. However, due to globalization, business development and complex structuring, different jurisdictions have taken

various measures to ensure value preservation and maximization in respect of group entities undergoing insolvency/administration proceeding.

The working group focused on understanding the practices in other Asian countries on following areas of Group Insolvency:

- i. Group – What is covered in Group? Is this decided based on Control and / or ownership or are there any other indicators?
- ii. Following areas relating to Procedural & Substantive Coordination:
 - a) Joint application or separate applications
 - b) Adjudicating Authority – Single/Common or multiple
 - c) Insolvency Professional – Single/Common or multiple
 - d) Concept of Group Creditors Committee (Right/duties/obligations)
 - e) Cooperation, Communication, and Information sharing protocols.

Considering the fact that India's strong promoter group culture shares common characteristics with its Asian counterparts, countries in the Asia-Pacific zone with an established Insolvency and Bankruptcy regime may provide options for



the features of the proposed Group Insolvency regulations in India. It was decided to study and analyze practices on Group Insolvency in other Asian countries and jurisdictions with similar corporate structures, as in India such as Japan, China, Singapore, Thailand, Hongkong, Malaysia, Vietnam, Korea, and Australia.

Based on the study of legislations and practices in other Asian jurisdictions, it is observed that by and large there are no legal provisions for joint filing and / or substantive consolidation of corporate group insolvencies. However, in some of the jurisdictions, appointment of common /single Insolvency Professional is allowed and encouraged and similarly matters relating to one corporate group are combined for hearing cases by one Adjudicating Authority. Such consolidation is allowed by adjudicating authority after considering criteria like degree of inter-connectedness in terms of ownership and business interests, guarantee/

indemnity arrangement among group companies, location of majority of businesses in the group, perverse behavior among group entities, etc.

Moreover, by and large, healthy or solvency company of the group are not envisaged to be included for the purpose of consolidation across foreign territories. The observations on law and practice followed in such Asian jurisdictions, in respect of group insolvency features, group definition and procedural/substantive consolidation, have been provided as follows:

Japan³

The Insolvency proceeding must be petitioned with respect to each company separately and the court would also look at each company separately.

The general rule is that it is not permissible to make a distribution of group company assets on pro-rata basis without regard to the assets of the individual corporate entities involved.

“Japanese law permits a single trustee to administer the assets and liabilities of an entire corporate family.”

Substantive consolidation without relevant creditors' consent is not permissible.

Combining Parent and subsidiary proceedings

If the parent and subsidiary companies are all under corporate reorganisation proceedings, the court and trustee (usually the same court and the same trustee will handle the group companies) may think of merging of all or a part of the companies for the purpose of reorganisation and the trustee may draft the reorganisation plans to that effect.

Joint Proceedings/ Group Insolvency Coordination

- i. Joint proceeding is not allowed, each member of group is treated as a separate legal entity. However, Under the Bankruptcy Act and the Civil Rehabilitation Act, if a debtor has 1,000 or more creditors, the court shifts jurisdiction to the Tokyo District Court or the Osaka District

³Source: Baker McKenzie: Global Restructuring & Insolvency Guide

Court (Article 5, paragraph 9, Bankruptcy Act; Article 5, paragraph 9, Civil Rehabilitation Act). In addition, any corporate reorganization case can be filed directly with the Tokyo District Court or the Osaka District Court (Article 5, paragraph 6, Corporate Reorganization Act). Therefore, when a family of companies meets these conditions, their insolvency proceedings can be filed with the same court and be managed by a single judge. This is even if the members of the corporate family are organized under, or operate in, different locations, and the courts do not otherwise have jurisdiction based on the companies' main places of business, the locations of the business venue, or the locations of their property.

ii. Japanese law permits a single trustee to administer the assets and liabilities of an entire corporate family. As a matter of practice, the courts usually appoint the same person(s) as trustee(s) of the corporate family if they are proceeding under the same law unless there is a specific conflict between members of the corporate family or other reasons to appoint separate administrators.

iii. In Japan, courts generally do not avoid appointing a single person as trustee of an entire corporate

“ In China, the combination of bankruptcy procedures of the parent company and its subsidiaries is permitted in practice. ”

family simply because a parent company has an outstanding loan to a subsidiary or because a parent company has the guarantor's right of indemnity against a subsidiary. The courts tend to prioritize efficiency and have confidence in the trustees' decisions and discretion about balancing conflicts.

China⁴

As per Enterprise bankruptcy law, there are no circumstances in which a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates. In practice, the parent corporation should bear the responsibility for its subsidiary if that subsidiary is not an independent entity or it has conducted an abnormal transaction.

⁴ Source: *Restructuring and insolvency in China: overview | Practical Law (thomsonreuters.com)*

Combining Parent and subsidiary proceedings

The combination of bankruptcy procedures of the parent company and its subsidiaries is permitted in practice. Under such circumstances the assets and liabilities belonging to the companies may be pooled for the distribution.

Singapore⁵

In Singapore the parent and affiliated corporation are regarded as a separate legal entities, also the parent company could not bear any liability incurred by the subsidiaries or affiliates but in the exceptional circumstances the court may lift the ‘corporate veil’ and hold liable the controller of a company.

Combining Parent and subsidiary proceedings

- i. Each member of a corporate group has its own separate legal personality, therefore insolvency proceedings within the corporate group against the separate entities will prima facie proceed separately. It might be possible, in the interest of saving time and costs that liquidation of parents and their subsidiaries be heard together, or the same liquidator be appointed over several related companies.
- In Singapore, Joint proceeding is not allowed, each member of group is treated as a separate legal entity.**
- ii. The assets of subsidiaries may be pooled to the parent for distribution purposes, the only assets available for distribution purposes are the shares in the subsidiaries. However, the liquidator may choose to wind up the subsidiaries in which case, the assets will be distributable in the main liquidation provided that the subsidiaries owned debts are fully settled first.

Joint Proceedings/ Group Insolvency Coordination

- i. Joint proceeding is not allowed, each member of group is treated as a separate legal entity. However, application with the court can be moved for appointment single trustee for all group companies to ensure coordination and no conflicts during the insolvency proceedings.

⁵ Source: *Restructuring & Insolvency 2020 | Singapore* | ICLG

- ii. Singapore law also allows proceeding with same court and judge against the group companies.

Thailand⁶

- i. As per the Thai laws, there are two types of company private limited companies and public limited companies. The liability of shareholders in both legal entities is limited only to the extent of any unpaid amount on the shares that are subscribed by them.
- ii. The doctrine of separate legal entity is strictly upheld, hence a parent company or affiliated corporation can be held responsible for the liabilities of subsidiaries or affiliates only in the event that the partner or affiliated corporation has personally guaranteed the entity's debts or where it has made itself a co-debtor with its subsidiary or affiliates.

Combining parent or subsidiary proceedings

Under Thai laws, there is no procedure for combining the parent company and its subsidiaries, thus none of the assets and liabilities can be pooled

“Under Thai laws, there is no procedure for combining the parent company and its subsidiaries, thus none of the assets and liabilities can be pooled for distribution purposes.”

for distribution purposes. The assets are not allowed to be transferred from an administration in Thailand to an administration in a foreign country.

Hongkong⁷

- i. The Hongkong law treats each member of a corporate group as an entirely distinct entity from other members other than in a very specific circumstance. Accordingly, a parent or affiliated corporation is not responsible for the liabilities of subsidiaries or affiliates in an insolvency process.
- ii. A parent company may conceivably be held liable for the acts of its subsidiary pursuant to the law of agency however there is no

⁶ Source: Thailand: Restructuring & Insolvency – Country Comparative Guides (legal500.com)

⁷ Source: Hong Kong: Restructuring & Insolvency – Country Comparative Guides (legal500.com)

presumption that a subsidiary is the agent or alter ego of the parent company.

- iii. A parent company may also be liable for the act of its subsidiaries under the tort of conspiracy and negligence. Depending on the facts there can be a primary direct duty of care on a parent company towards employees and potentially other affected by the activities.
- iv. There is no mechanism where assets may be dealt with the level of corporate group without regard to the insolvencies of individual entities.

Combining parent or subsidiary proceedings

Hongkong law treats each member of a corporate group as an entirely distinct entity from its member other than in a very specific circumstance. Accordingly, the assets and liabilities of companies are not combined into one pool for distribution in an insolvency process. As a practical matter, where

In Hongkong, there is no mechanism where assets may be dealt with the level of corporate group without regard to the insolvencies of individual entities.

there is a corporate group, there may be an administrative advantage to having the same insolvency officer appointed in respect of each of the companies in group, but each entity will still be treated separately.

Joint Proceedings/ Group Insolvency Coordination

- i. Joint proceeding is not allowed in Hong Kong. However, application with the court can be moved for appointment of single trustee for all group companies to ensure coordination and no conflicts during the insolvency proceedings.
- ii. Hong Kong law also allows proceeding with same court and judge against the group companies.

Malaysia⁸

Joint filing

- i. Except scheme of arrangement proceedings, Malaysian law does not permit a joint proceeding in relation to insolvency proceedings for a group

⁸Source: *Insolvency and directors' duties in Malaysia: overview | Practical Law (thomsonreuters.com)*

of companies. Separate insolvency proceedings must therefore be filed for separate companies. However, even in non-scheme of arrangement proceedings, the law permits practical acknowledgement of the related proceedings, which means that an application can be made for the related proceedings to be heard in the same court and before the same judge. In practice, this is rare. For scheme of arrangement proceedings, a single application governing a group of related companies can be made, with appropriate measures being taken to properly segregate the creditors and marshal them into classes as appropriate to each company within the group. For the newly introduced judicial management process, companies in the same group may be placed under judicial management and the same judicial manager may be appointed.

- ii. It is likely that members of the same group of companies will share the same registered address, so separate proceedings can be initiated against different companies within the group, which can then be consolidated or heard together as if they were a single proceeding. However, if the members of the group have their registered addresses in separate states in Malaysia, they must make an application to transfer proceedings to a location where most of the group companies and their creditors are located. In deciding whether to transfer the proceedings, the court will take the following factors into consideration:

In Malaysia, separate insolvency proceedings must therefore be filed for separate companies.

- a. Where the bulk of the company’s assets are located.
 - b. Where the majority of the creditors are located.
- iii. There is no requirement for the members of the corporate family to proceed under the same type of proceeding. Each entity is legally entitled to decide on its preferred mode of insolvency proceeding.

Single Insolvency Professional/ Administrator

- i. Generally, a single administrator, conservator, liquidator, trustee or receiver cannot be appointed over an entire group of companies.

ii. However, if a number of companies from the same group are subject to the special administration or conservatorship processes, the Danaharta Corporation or the Malaysia Deposit Insurance Corporation, as the case may be, can appoint the same individual as administrator or conservator of each member of the group. In that case, the same administrator or conservator will administer the assets of the various companies within the group more conveniently, efficiently and coherently than if different administrators or conservators had been appointed over each company within the group. However, as there is no true collective procedure and assets cannot strictly be pooled, the restructuring proposal under the administration or conservatorship must be tailored to each individual company. The pay-out to creditors of the group will invariably be limited to the assets of the debtor company. Creditors do not have a say in the appointment of the administrator or conservator.

The pay-out to creditors of the group will invariably be limited to the assets of the debtor company. Creditors do not have a say in the appointment of the administrator or conservator.

iii. Under the new judicial management regime, it will be possible for member companies in a group of companies to be placed under judicial management under one court order. In such a case, following the experience in other jurisdictions, it is likely that two or more judicial managers will be appointed jointly and severally over all the companies so as to enable them to have the time to deal with the affairs of more than one company.

iv. Although it is not possible to appoint a single liquidator for all members of a group of companies, the same individual can be appointed as liquidator of each member of the group. Again, a single liquidator cannot administer the winding-up on a pooled basis, and creditors will be paid out from the assets of the company that is indebted to them. Unlike for special administration and conservatorship, creditors have a say in the appointment of the liquidator in compulsory winding-up proceedings. They have a right to be given notice and to be heard before a liquidator is appointed for each company within the group. One situation where the same liquidator cannot be appointed for all members of a group of

companies is where a company in the group has a cross-claim or inter-company receivable due from another group company or the holding company, and a potential conflict arises which makes it difficult for a single group-wide liquidator to perform his or her functions objectively.

- v. Generally, Malaysian law does not allow for the pooling of assets or liabilities of some or all member companies within a corporate group. Malaysian law treats each claim against each group member as separate and distinct. Therefore, creditors fully expect to have each company's assets ring-fenced and made available for realisation for the benefit of all classes of creditors of that company alone, and not for creditors of the group as a whole. One of the reasons for this is that some creditors may have dealt with one company without knowing that it was part of a group.

“Generally, Malaysian law does not allow for the pooling of assets or liabilities of some or all member companies within a corporate group.”

Perverse Behaviour

- i. When the company is solvent, the directors owe a duty to the company. However, this duty shifts to the creditors when the company is insolvent. Therefore, any transactions made when the company is insolvent must be carefully examined. If the transaction involves the transfer of an asset by one member of a group of companies at an undervalue or which in effect confers a preference on a related company, then it is liable to be set aside.
- ii. Malaysian law on the avoidance of transactions is strict and does not require any evidence or due consideration of the transferor's or transferee's motives or intention. Under section 528(1) CA 2016, a transaction is absolutely void and a liquidator can take steps to recover the money or asset transferred where both:
- iii. The transaction involves a payment or a transfer of assets by an insolvent company in favour of another company, including a company within the same group.
- iv. The transaction occurs within a period of six months from the date of presentation of a winding-up petition (which subsequently results in a

winding-up order) or within six months of a resolution to voluntarily wind up the company. This covers the six-month period immediately preceding the date of commencement of winding-up, which is deemed by statute to be either the (as the case may be):

- a. date of the presentation of the winding-up petition, or
- b. date when the resolution of the company's members to voluntarily wind up the company is passed.

Vietnam⁹

Under the laws of Vietnam, a corporate group is not a type of business entity and does not have legal status. The current laws on bankruptcy do not provide a special or separate procedure applicable to the restructuring or reorganization of a corporate group during insolvency proceedings.

Korea¹⁰

- i. As per the Korean law a parent or affiliated corporation is not responsible for the liabilities of subsidiaries or

“As per the Korean law a parent or affiliated corporation is not responsible for the liabilities of subsidiaries or those affiliated as each corporation including a debtor is an independent legal entity.”

those affiliated as each corporation including a debtor is an independent legal entity. However, a parent company that holds 50 percent or more shares of a debtor may be liable for the debtor's tax as a second taxpayer.

- ii. In addition, the unsecured reorganisation claims of a parent or affiliated corporation may be unfavorably regulated in the reorganisation plan to compared to the right of unsecured reorganisation claim holders. This comes from the principle of good faith and fairness in making a reorganisation plan.

⁹ Source: *Restructuring and insolvency—Vietnam—Q&A guide | Legal Guidance | LexisNexis*

¹⁰ Source: *Global Restructuring Review - Asia-Pacific Restructuring Review*

Combining parent or subsidiary proceedings

When a corporation group commences reorganization proceedings, the proceedings are not combined. The assets and liabilities of the companies are not pooled for distribution purposes. However, the bankruptcy court may run a parent company's reorganization proceeding parallel with other companies' reorganization proceedings for administrative purposes.

Australia¹¹

As per the Australian law, Cross-collateralization and group guarantees are often sought by lenders into a corporate group. These guarantees provide comfort that a holding company will stand behind special purpose vehicles or operation companies. The statutory cross-guarantee provides for a group to be liable for each other group members debt and is designed to afford a level of comfort to creditors providing services or lending to operating subsidiaries.

Joint Proceedings/ Group Insolvency Coordination

- i. Joint proceeding is not allowed in Australia, each member of group is treated as a separate legal entity. However, application with the court can be moved for appointment single trustee for all group companies to ensure coordination and no conflicts during the insolvency proceedings.
- ii. Australian law also allows proceeding with same court and judge for proceedings against the group companies.

“As per the Australian law, Cross-collateralization and group guarantees are often sought by lenders into a corporate group.”

Summary of country-wise findings as above, in tabular form is provided in Table- 1 for ease of understanding.

¹¹ Source: Source: Baker McKenzie: Global Restructuring & Insolvency Guide

Table 1: Summary of country-wise findings

Country	Whether Law provides for Joint Applications for Group Insolvency in Related Entities	Whether Law allows Group Cases under Single AA	Whether insolvency of Group entities, managed by one IP/ Trustee/Administrator*	Whether Law provides for Group COC in Group entities	Whether Law provides for Procedural/Communication protocol in GI Cases	Whether Law provides for GI thru Substantive Consolidation
Japan	No	Yes	Yes, on case to case basis	No	No	No
China	No	No	No	No	No	No
Singapore	No	Yes on case to case basis	Yes on case to case basis	No	No	No
Thailand	No	No	No	No	No	No
Hong Kong	No	Yes	Yes	No	No	No
Malaysia	No except in arrangement proceedings	Yes on case to case basis	No	No	No	No
Vietnam	No	No	No	No	No	No
Korea	No	**No	No	No	No	No
Australia	No	Yes	No	No	No	No

Note:

Insolvency professional in different international jurisdictions are also termed as Trustee/Administrator.

* Insolvency professional

** But in some situations Parent Company proceedings can be run simultaneously with other group companies for administrative purposes



PART 4

RECOMMENDATIONS

In final analysis, the benefits of having a Group insolvency framework are well established in the pursuance of prescribed objectives of IBC viz. maximization/preservation of value of business or assets, timely resolution of distressed business in an orderly manner and balancing the interests of various stakeholders. The substantive consolidation, though desirable and more effective, as established by many legal pronouncements, may however involve procedural, operational, and legal challenges. Such challenges lie in lifting the corporate veil of separate but connected legal entities and consolidating them in terms aggregated view of asset, liabilities, and rights of different stakeholders. These entities though part of a group, are separate in terms of structure, ownership, management and in some case even the governing laws. In the interim and as a first phase therefore, procedural consolidation may provide a solution before a full-fledged framework could be introduced based on the experience of procedural coordination and of substantive consolidation carried out under the orders of judicial authorities. The framework should however provide for reference to adjudicating authority for substantive consolidation by applying the criteria's justifying substantive consolidation and also mechanism to be followed to facilitate substantive consolidation. In this context, experiences across foreign jurisdictions, especially Asian countries, as provided elsewhere in this document, can provide valuable inputs.



It is evident that value can be destroyed unless the CDs with inter-linkages are subjected to consolidation, across the stages of appointment of RP, AA, CoC and Resolution Applicant (RA). Else, significant value, time and efforts are wasted aligning the different stakeholders and in endless litigation, as has been seen in a few cases. Given that value maximization and continuation of business are key objectives of the IBC, it is imperative to approach such CIRPs

in a consolidated manner. Moreover, the negotiation power of the creditors through joint resolution is expected to be much stronger than standalone resolution.

Having established the desirability of consolidated approach for group insolvencies, the key conclusion and recommendations of the research working group are summarized below:

4.1 Approach for Introducing of Group Framework

The lockdown and imminent threat of worst ever economic recession since 1930 pose survival threats to many group companies and conglomerates, and may



push some of these to proceedings under Insolvency and Bankruptcy Code 2016 (IBC). The IBC however does not envisage synchronization of insolvency proceedings of an entity in a group. Suspension of the IBC gives an opportunity to discuss and debate for an efficacious framework addressing issues in Insolvency proceedings particularly of large corporate involving substantial

public funds. In a present-day business context, most of the large and mid-sized companies have a subsidiary or associate or joint venture and these together act as a group.

In the absence of formal group insolvency framework, parties asked to sacrifice more, would resist to cooperate, and give consent, causing delays and legal disputes. This may be true even though such parties considered group perspective while lending or entering commercial arrangement. The IBC should, apart from 'procedural coordination mechanisms' (or PCMs), as suggested by WG (of IBBI), also provide for consolidation of assets and liabilities as well as the basis for resolution of conflicting interests of lenders and other stakeholders in different group entities.

Given the current regulatory scenario, Group insolvency framework should be approached in a phased manner, first looking at the cases where procedural or substantive consolidation is possible with or without intervention of AA,

gain insights and at the second stage, introducing regulatory changes to facilitate consolidation. A few practical suggestions have been enumerated below:

- i. Lenders should identify the stressed companies in their portfolio which have such business models and actively seek group insolvency from day one itself. If CIRP is initiated by an OC, the CoC should examine this in the first instance and seek consolidation.
- ii. A better co-ordination among the financial creditors is quite desirable since decisions by such CoCs can be taken more quickly and effectively. In case of common lenders, cases can be moved under a common application seeking to bring all groups companies under the same CIRP and subject to common or similar CoC.
- iii. It is worth examining whether a healthy company within the group could be drawn into the CIRP, even if it may not be a defaulter. However, it was observed that though such dispensation is desirable to preserve and maximize the underlying value, without legal framework based on sound reasoning, it may not be possible to draw a healthy company into the insolvency proceedings of other group companies in view of corporate veil.
- iv. In the event of CDs / Business Groups with linked business model, where lenders are different, the consolidation will ensure that all stakeholders realize maximum value. While subsidiaries may not be under CIRP, it is essential to call upon the guarantees provided by parent to pull them into CIRP which may not be possible otherwise.
- v. At the stage of sanctioning the credit facilities, it would be worthwhile for the lender(s) to proactively examine and address the inter-group relationships including securities and guarantees. Guidelines by the banking regulator would be helpful in this direction.
- vi. It is necessary that RBI revisits its norms for loan classification, restructuring of loans and for financing of rehabilitation plans. These

“ A better co-ordination among the financial creditors is quite desirable since decisions by such CoCs can be taken more quickly and effectively. ”

norms should take a composite view of inter-dependent entities within the group on the lines of the framework for group insolvency

4.2 Regulatory Framework for Group Insolvency

Before a comprehensive framework of Group Insolvency under IBC could be introduced to address the substantive aspects, sufficient experience and better insights would be required. Meanwhile suitable provisions should be introduced in the Code, regulations, or best practices to take care of procedural aspects of consolidation in regard to following :

- i. Initiating consolidation application by the financial creditors.
- ii. Joint application for admission as well as consolidation by creditors.
- iii. Transfer of matters inter bench so that the parent and its subsidiary entity matters are listed in the same bench.
- iv. Resetting of CIRP timelines after the AA permits consolidation
- v. Enabling RP/CoC to initiate Section 10 application for its group companies.

“ Suitable provisions should be introduced in the Code, regulations, or best practices to take care of procedural aspects of consolidation. ”

The framework for pre-pack insolvency as has been circulated by Ministry of Corporate Affairs for public comments, may also consider and incorporate the concept of ‘group’ while resolving insolvency of inter-connected entities.

4.3 Definition of Group

The IBBI WG had recommended that, a ‘corporate group’ may include holding, subsidiary and associate companies, as defined under the Companies Act, 2013. It also recommended that, an application may be made to the Adjudicating Authority to include companies that are so intrinsically linked as to form part of a ‘group’ in commercial understanding, even if not covered by the definition of



corporate group as above.

As this recommendation is exhaustive and provides for inclusion of companies in corporate group even if not covered in the proposed definition of ‘corporate group’ subject to the approval of the AA, the working group is not suggesting any change in this regard.

4.4 Joint/Substantive Consolidation: Eligibility

Substantive Consolidation essentially is aimed at effective amalgamation of holding/subsidiaries during CIRP of such inter-connected bodies, wherever found expedient. At times though this may not be practical and in such cases procedural consolidation should be pursued with the approval of AA and COC. A few criteria for considering eligibility for consolidation are as follows:

“ Substantive Consolidation is advisable where the affairs of the companies are so entangled that joint resolution should benefit all creditors. ”

- i. Where the assets of the subsidiaries are exclusively used for the business of its parent or vice versa.
- ii. Where the management and staff are common or deployed interchangeably.
- iii. Where the affairs of the companies are so entangled that joint resolution should benefit all creditors.
- iv. Where separating assets may be prohibitive and may hurt creditors’ interests.
- v. Where the expenses of the subsidiaries are met by the parent as the assets owned by the subsidiaries are exclusively used by the parent.
- vi. Where it is difficult to find another entity willing to acquire the CD due to various other considerations and standalone resolution may yield lower value for the creditors concerned.
- vii. Where the lenders, while lending have relied on the business linkages of subsidiaries and parent.

- viii. Where the lenders of all the group companies are agreeable for reviving all the entities through a common resolution plan.

4.5 Comparative Analysis of the Report of IBBI WG on the Subject

In its report, the WG constituted by IBBI in 2019 under the chairmanship of Sh.UK Sinha had highlighted the principles providing direction to the prospective corporate group insolvency regulatory framework (CIRP). The endeavour of current research working group is to take the agenda forward in the light of recent practical experience, jurisprudence, and lessons from international territories, especially in Asia. It could be interesting to compare the findings of two working groups vis-à-vis key aspects of group insolvency. Few of the key recommendations/observations of earlier WG have been compared with that of current WG in the Table 2.

Table 2: Comparison of key recommendations/observations of earlier WG with that of current WG

Area	Report of the Working Group on Group Insolvency -Sept 2019	Views of Research Group on Procedural & Substantive Aspects of Group Insolvency
1. ELEMENTS OF A COMPREHENSIVE FRAMEWORK FOR TACKLING GROUP INSOLVENCY	a. Procedural Coordination b. Substantive Consolidation c. Rules dealing with perverse behavior of companies in corporate groups WG recommended that in the first phase, the framework may not include substantive consolidation.	No change in approach is suggested.
2. IMPLEMENTATION		
Jurisdictional scope	The framework for group insolvency in India should be introduced in a phased manner. Considering that implementation of the provisions pertaining to cross-border insolvency of debtors with assets in different jurisdiction is not complete,	No change in approach is suggested until framework for Cross-Border Insolvency is notified.

Area	Report of the Working Group on Group Insolvency -Sept 2019	Views of Research Group on Procedural & Substantive Aspects of Group Insolvency
	<p>WG recommended that in its first phase, the framework for group insolvency may cover only domestic entities.</p>	
<p>Elements of the framework</p>	<p>In the first phase, the framework may not include substantive consolidation. IBBI and the Central Government may consider rolling out provisions for insolvency of cross-border groups and substantive consolidation at a later stage.</p>	<p>Certain criteria should be provided in the framework which could be trigger- points for an applicant to pursue substantive consolidation process; however, decision should be left to wisdom of Adjudicating Authority.</p> <p>Criteria could be as under:</p> <ol style="list-style-type: none"> 1. Substantial (10% or more) interdependency (purchase/ sale/loans) within Group entities (Group should be considered as defined under the Companies Act other than in cases as mentioned in point no 2 below) 2. Where group companies are jointly responsible for delivering a project, while applying these criteria, one may look at entities beyond definition of Group. This is very commonly applicable in Real Estate Projects where Land owning companies and

Area	Report of the Working Group on Group Insolvency -Sept 2019	Views of Research Group on Procedural & Substantive Aspects of Group Insolvency
		<p>developer companies could be different.</p> <p>Further, there may be cases where there are multiple legal entities (part of different Groups) which would have entered deeds/ arrangement for co-development of a project.</p>
3. APPLICABILITY	<p>A definition of group should be provided, so that a case-by-case analysis need not be made to assess the applicability of the framework.</p> <p>WG examined various possible definitions of 'Group' and of the definitions, the WG was of the view that factors of control and ownership (which have been basis generally in each jurisdiction and largely in all the regulations) are best reflected in the definitions of holding, subsidiary and associate companies in the Companies Act, 2013. Together, these consider both horizontal and vertical integrations between group companies. Further, the WG be-lieves that relying on the definitions in the Companies Act, 2013 which is the statute governing companies in the country, will provide certainty and clarity to all stakeholders. Given this, the WG recommends that this framework be made</p>	<p>While applying to AA for consolidation involving entities which are not part of the Corporate Group because there is no default, the documents with Banks/ FIs should be examined, that would have been considered at the time of credit risk assessment or otherwise. If an entity has been considered as part of Group while sanctioning the loan and overall exposure, then such entity, even if not forming part of the Group per se under Companies Act, should also be brought under the ambit of Corporate Group for the purpose of procedural coordination (through framework) / substantive consolidation (through AA).</p>

Area	Report of the Working Group on Group Insolvency -Sept 2019	Views of Research Group on Procedural & Substantive Aspects of Group Insolvency
	<p>applicable to a ‘corporate group’ that is defined to include holding, subsidiary and associate companies.</p> <p>However, this definition may not include all cases where recourse to a group insolvency framework may be beneficial. In such cases, the WG recommends that an application may be made to the Adjudicating Authority to include companies that are so intrinsically linked as to form part of a ‘group’ in commercial understanding, but are not covered by the definitions above, if it can be demonstrated that this will result in maximisation of value of the insolvent company.</p> <p>This means that companies that have not committed default, or companies that are not covered under the Code, cannot be covered under procedural coordination. Similarly, rules against perverse behavior, will be applicable in those cases where even one company in the group is insolvent and the Adjudicating Authority passes orders pursuant to perverse behavior established based on the facts and circumstances of the case.</p>	<p>Framework should include some criteria which could be considered by AA for excluding entities from the Group for the purpose of applying procedural coordination or substantive consolidation.</p> <p>For instance, in case of different business operations and no interdependency among the entities, where no direct / indirect inter-corporate loans, or where investment by parent is less than 10% of total assets of parent.</p>

Area	Report of the Working Group on Group Insolvency -Sept 2019	Views of Research Group on Procedural & Substantive Aspects of Group Insolvency
4. PROCEDURAL COORDINATION MECHANISM		
<p>A joint application process for the insolvency resolution of multiple insolvent companies in a group</p>	<p>A single application to commence the CIRP for multiple group companies that have committed a default (“joint application”) may be made by financial creditors, operational creditors or the group companies themselves.</p>	<p>Need to address the common issues of group entities where generally loans are disbursed in parent and then funds are advanced from parent to subsidiary /associate(s). While there could be defaults at parent level but not at the level of subsidiaries / associates. In situations like these, applicants should be allowed to file insolvency proceedings against such subsidiaries / associates even if there are no defaults in repayment by such subsidiaries / associates provided such inter-corporate advance /loan constitutes more than 10% of the total assets of parent. Joint application should also be pursued where companies are closely integrated such that value maximization is not otherwise possible or where the perverse behavior can be clearly established. Such approach shall ensure value maximization on a consolidated level.</p>

Area	Report of the Working Group on Group Insolvency -Sept 2019	Views of Research Group on Procedural & Substantive Aspects of Group Insolvency
<p>A single Adjudicating Authority to administer all insolvency proceedings of companies in a corporate group</p>	<p>A single Adjudicating Authority should administer insolvency proceedings of companies in a group.</p>	<p>Additional suggestion is that if within 60 days application is not admitted for Group Insolvency at a particular NCLT because of jurisdictional issues due to different entities having different registered offices in other States, then appeal should lie with NCLAT to adjudicate on such jurisdiction. 60 days' time-limit is suggested to ensure that unnecessary time should not be spent at admission stage.</p>
<p>A single insolvency professional to be appointed in insolvency proceedings for companies in a corporate group</p>	<p>A single insolvency professional may be appointed in the insolvency proceedings of all companies in a corporate group by Adjudicating Authorities.</p> <p>In situations where the appointment of a single insolvency professional would result in potential conflicts of interest or the same insolvency professional would not have sufficient resources to carry out her duties in respect of multiple appointments, the WG recommends that different or multiple insolvency professionals may be appointed for different companies.</p>	<p>Considering that such group insolvencies would require multiple resources and large teams, this group recommends for appointment of Insolvency professional who is partner / director in an Insolvency Professional Entity. This is to ensure that there is no uncertainty about committed resources available to handle such large insolvencies.</p>

Area	Report of the Working Group on Group Insolvency -Sept 2019	Views of Research Group on Procedural & Substantive Aspects of Group Insolvency
The formation of a group creditors' committee	<p>The CoCs in the insolvency proceedings of different companies in a corporate group may be different where the financial creditors of the companies are not the same.</p> <p>In such situations, WG recommended that the formation of a group creditors' committee, at the discretion of CoCs of each group company, may be allowed.</p>	<p>There should be mandatory provision to appoint Group creditors committee and Group Insolvency Professional / administrator on the basis of certain criteria e.g. if number of entities in the Group are above certain threshold (say 5), interdependency of business transactions, and inter-company loans/ advances.</p> <p>Group Committee may comprise of majority lenders by value from each such company in the Group.</p>
Cooperation, communication, and information sharing between CoCs	<p>Where different insolvency professionals, Adjudicating Authorities and CoCs are involved, the WG recommends that they should be mandated to cooperate, communicate and share information with each other for effective administration of different insolvency proceedings.</p>	<p>Following mandatory regulations can be introduced:</p> <ol style="list-style-type: none"> a. Mandatory appointment of Group Creditors Committee where no of CD in the Group are more than a particular threshold (5 or more) b. In cases covered in (a) above, mandatory provision of Group Insolvency Professional / Group Coordinator (anyone of the RPs of the largest entity in

Area	Report of the Working Group on Group Insolvency -Sept 2019	Views of Research Group on Procedural & Substantive Aspects of Group Insolvency
		<p>Group or another IP) in addition to individual Insolvency professionals.</p> <p>c. Mandatory meetings of Group Creditors Committee to discuss and approve EoI Criteria, terms of RFRP and for final assessment of the Resolution Plan and distribution and decision to liquidate.</p>
<p>5. TYPES OF RULES AGAINST PERVERSE BEHAVIOUR OF GROUP COMPANIES</p>		
<p>a) Subordination of Claims b) Extension of liability c) Contribution orders d) Avoidance of certain transactions</p>	<p>1. Adjudicating Authority be empowered to subordinate the claims of other companies in a group in exceptional situations of fraud, diversion of funds, etc.</p> <p>2. Since Code already allows for certain transactions to be avoided in insolvency proceedings, and provides for longer look back periods when such transactions are conducted within group companies and hence WG recommended that no further provision is required to be made to set aside transactions between companies that are part of the same corporate group.</p>	<p>No further changes from the guidelines are proposed.</p>

Area	Report of the Working Group on Group Insolvency -Sept 2019	Views of Research Group on Procedural & Substantive Aspects of Group Insolvency
	<p>3. The WG noted that a key purpose of extending liability on parent companies or its personnel is to deter perverse behavior of such companies. The WG noted that Chapter VII of Part II of the Code has extensive provisions to hold an officer of a company liable for activities specified therein. And hence WG recommends that no provision may be made to extend liability to parent companies or issue contribution orders.</p>	

4.6 Guidelines for Procedural Coordination

There is a need to evolve procedure for identifying group entities which are to be included under GI process. This should be done not only if the entity is insolvent but also where there are interlinkages of business model and management that necessitate GI, with intervention of AA. Though comprehensive and substantive consolidation may require more evidence and experience, procedural coordination is much needed in the interim, to ensure transparency, expediency, and uniformity. Some of the important areas where such guidelines are recommended for procedural coordination, are as follows:



- i. Procedure for application, to be submitted as a group, by creditors should be specified for Sec 7 and 9 applications under IBC. Moreover, such application can be made compulsory for Sec 10 applications by CDs.
- ii. The creditors to carry out the review of group operations to finalize entities deemed fit for inclusion in GI process.
- iii. AA to accept consolidated applications as also allow inclusion of further entities if deemed appropriate by creditors. Post review by Creditors, more entities may be included in the same process. Creditors can be given a finite time (say, 1 month) for this review.
- iv. Courts may need to cooperate and communicate inter-se to facilitate effective administration of proceedings to the extent possible. Such facilitation may be in respect of appointment of IPs, insolvency process across group entities involved, conduct of hearing and approval of applications, etc. The costs of such effort should be considered costs of CIRP to be allocated across different group entities.

“ In view of limitation (likely in future) on number of CIRPs manageable by one RP, there could be a need to appoint more RPs for larger GIs. ”

- v. In view of limitation (likely in future) on number of CIRPs manageable by one RP, there could be a need to appoint more RPs for larger GIs. In such cases, need would also arise to identify an overall RP who should be in control of the parent / main company, besides managing the GI process.
- vi. COC of all group entities to be constituted covering FCs across all group entities. Their inter-se voting power may be computed after taking into account their respective share(s) across group entities.
- vii. Valuers to be appointed to provide valuation of business assets for the group as well as for individual entities. This would be required in case any entity has business interests apart from those interlinked with the Group.
- viii. All public announcements, IM, RFRP, EM etc. to be presented on a group basis. RAs to be invited to bid for entire group only. RAs may be given flexibility to sell off any unrelated businesses of group entities.



ANNEXURE I

CASE STUDY ON REAL ESTATE COMPANY

Case Study on Real Estate Company with Housing Project involving Multiple Land Owning Companies.

Background:

The CD, IREO Five Rivers Private Limited is a real estate developer in the residential sector. CIRP was admitted against the CD under section 9 of IBC and IRP was appointed. Apart from one NBFC as the main financial creditor (FC), there was a Bank as FC for guarantees given to various statutory authorities. The CD had sold various plots and flats in a plotted sector and high-rise tower, hence, there was a class of creditors of home buyers.

The IRP was not confirmed as RP and after 270 days of CIRP, RP was appointed. The RP, after authorisation of COC, applied for further extension of CIRP for 90 days, which was granted by the AA.

The RP realised that the only asset in the hand of CD was the JDA. However, almost 75% of the land bank under the said project was mortgaged to two financial creditors of the CD. RP decided to approach the resolution for the CD by way of either merger or complete shift of ownership of land-owning companies as part of resolution plan of the CD. The valuers were also apprised for conducting the valuation accordingly.

After initial hiccups, the prospective resolution applicants, submitted the Resolution plan in line with the strategy adopted by RP. Meanwhile RP was able to capture rest of the 25% land documents from the landowning companies/CD's promoters for keeping in the safe custody of the FCs.

Rationale for Joint Resolution

- i. The assets of the ten Group companies were exclusively purchased for the business of its CD under CIRP.
- ii. The management and deployment of staff was common, the key managerial personnel (KMP) appointed were the employees of the CD.
- iii. The affairs of these companies were so entangled that joint resolution only could benefit all the creditors. Separating assets could be prohibitive and hurt all creditors.

- vi. The expenses of these ten companies were met by the CD as the assets owned by these companies were exclusively to be used by CD.
- v. The assets of the these companies were exclusively charged with bankers of the CD for CD's exposure only.
- vi. These companies were not having any other liability other than the loan from CD.

Options Examined for Joint Resolution

- i. Substantive Consolidation
- ii. Amalgamation of subsidiaries during CIRP before approval of resolution plan for the CD
- iii. Amalgamation/consolidation of assets of subsidiaries through resolution plan for revival of CD.
- iv. All 10 companies were willing to sign the exclusive JDA with successful resolution applicant for the CD.

Challenges Faced

- i. No framework exists for substantive consolidation mechanism. The same was to be opted by creditors by making an application for consolidation before NCLT or it could be applied by the group chairperson as in case of Videocon.
- ii. The CD was already undergoing CIRP for the past 9 months and the 10 Group companies were not in default, hence could not technically be admitted into CIRP.
- iii. In the instant case, a separate consolidation application needs to be filed by the 10 Group companies and agreed by the RP/CoC of the CD which is undergoing CIRP.
- iv. CIRP is a time bound process. A substantive consolidation would require resetting of the clock for consolidated resolution plan of all the 11 companies which would result in delay in the revival of the CD. However, this delay should get compensated by the benefits of value maximization through consolidation.

- v. Amalgamation of Subsidiaries during CIRP before Resolution of CD shall require approval of the NCLT. Prior to the same, it shall also require approval of the different class of creditors and shareholders of the 10 Group companies, which may take some time and may not coincide with the CIRP timelines for the CD. Provisions of the Companies Act, 2013 shall be applicable.
- vi. Amalgamation/Consolidation of Assets of subsidiaries through Resolution Plan submitted for revival of CD by the Resolution Applicant shall also require approval of the different class of creditors and shareholders of the 10 Group companies before submission of the relevant resolution plan.
- vii. Balancing of all the different class of creditors shall be required.
- viii. Adequate legal framework for amalgamation of companies under IBC is also required for a seamless process so that benefits equally apply to all the group entities i.e. the parent and its subsidiaries /SPVs.

Experience in the Instant Case

- i. The class of creditor of the CD obtained stay from High Court against 10 Group companies not to alienate its assets.
- ii. RP impressed upon the Group management to co-operate in the resolution process of the CD, and to confirm to COC that they all were willing to sign the new JDA's once a resolution plan was approved. The said confirmation was obtained by way of an application to the AA against the 10 Group companies.
- iii. RP obtained from 10 Group companies the title deeds of the land bank not mortgaged with the FCs.



ANNEXURE II

IMPORTANT OBSERVATIONS ACROSS LEGAL PRONOUNCEMENTS

A. In case of State Bank of India Vs. Videocon Industries Limited, in MA 1306/2018 in CP(IB)-02/2018

Hon'ble NCLT, Mumbai bench observed that.....Henceforward Summum bonum, is that the UK / USA courts have dealt with the process of consolidation along with the jurisdiction of the Authority by pronouncing that equity and fairness ought to be a yardstick by lifting the corporate veil. Consolidation is to be utilized as a mechanism to maximise the value of financially stressed group of companies. Economic benefit ought to be the sole purpose and for that a preliminary searching enquiry is suggested which would yield benefit to stakeholders by off-setting any harm, if inflicted, if not consolidated. On due reading of all these judgements, one proposition of law emerges that the motion of 'consolidation' depends upon the facts and circumstances of each debtor/debtors. It is appropriate and suitable to give a ruling at this occasion that there is no single yardstick or measurement on the basis of which a motion of consolidation can or cannot be approved. With humility, this Bench herein below sets-out a list of examples, based upon reading the history of 'group insolvency', so that the presence of them can lead to a decisive conclusion of triggering of 'consolidation' of Insolvency process. Undisputedly, and also laid down by the courts, before ordering consolidation, a preliminary searching inquiry be ensured that whether consolidation yields benefits to stakeholders by offsetting the harm if not consolidated. Areas of inquisition and our finding on the facts of this case are :-

- I. Common Control: These companies are promoted by Dhoot Family.
- II. Common Directors: The family members of V.N. Dhoot are directors in all the Videocon group companies.
- III. Common Assets: There are many instances of interdependency between the group companies and the assets are common to such an extent that, for instance, one company has leased its land to another group company to carry on manufacturing.
- IV. Common Liabilities: The clauses of the VTL and RTL Agreements have demonstrated that "all guarantees thereof executed by one or more of the other Corporate Debtors are deemed to be one obligations of all the Corporate

Debtors. “The company along with 12 other affiliates/entities (collectively referred to as “Obligors” and individually referred to as “Borrower”) executed facility agreement with consortium of existing domestic rupee term lenders, in the obligor/coobligor structure, wherein all the Rupee Term Loans of the obligors are pooled together....” .

- V. Inter-dependence: Some corporate debtors are engaged in manufacturing, assembling and distribution of comprehensive range of consumer electronic and home appliances. Also manufacturing set top boxes, Colour Televisions, DVD Players Etc. by some Units/subsidiaries in Aurangabad. This is stated to be India’s Largest Electronics Retail chain. The uniqueness stated to be that all are marketed under single license of “Videocon Trademark”.
- VI. Inter-lacing of Finance: Pursuant to the RTL Agreement, a consortium of banks and financial institutions including SBI had agreed to grant ‘Rupee Terms Loans’ to the RTL obligors under an obligor/co-obligor structure. The Rupee Term Loans under the RTL Agreement were to be utilised for the purposes of refinancing of existing rupee debt of the RTL obligors, funding the capital expenditure in relation to the ‘Ravva Field’ and the capital expenditure in relation to the consumer electronics and home appliances business of the RTL obligors and such other end users as permitted by the facility agent under the RTL Agreement. Recital C of the RTL Agreement states that: “ The Rupee Term loan has been sanctioned by the lenders for the purposes of refinancing of existing Rupee debt of the obligors, funding the capital expenditure in relation to the consumer electronics and home appliances business of the obligors and such other end uses permitted by the Facility Agent”. (Emphasis Supplied).
- VII. Pooling of Resources: Facts and evidences have demonstrated that there was common pooling of human resources, liaising and funding. Undisputedly, the directors are common using their contacts and relationship to run all the subsidiaries for which common office staff, accountants, and other human resources are mobilised to manage the affairs collectively. Further, common arrangement of capital/funds is an accepted position in Videocon group.
- VIII. Co-existence for Survival: An interlinked chain of business operations is also evident in this group case. Electronic gadgets/home appliances are manufactured by a unit. However, distribution and market chain is controlled by another entity. Interdependence upon each other is a unique feature visible in Videocon group.

- IX. Intricate link of Subsidiaries: Consolidated accounts, pooling of resources, commingling of assets and business functions are the examples of intricate link among subsidiaries.
- X. Inter-twined Accounts: The consolidated accounts of 15 months is one of the evidence to demonstrate that on demand by the lenders, all the subsidiaries have prepared a common position of their assets and liabilities, thereafter, prepared consolidated accounts, stated to be duly approved by an auditor.
- XI. Inter-looping of Debts: On perusal of the agreements, it is evidenced that the clauses have made a provision of securing the debts owed by subsidiaries of Videocon group.....
- XII. Singleness of Economics of units: The group is known by its brand name "Videocon". Therefore, the entire economics of the group revolve around this brand name either for the purposes of procuring raw material or finally selling the appliances manufactured. The group as a whole is therefore, has a common economic feature to sustain and promote the business operations.
- XIII. Common Financial Creditors: As per two Agreements viz. RTL & VTL the lenders are members of 'consortium of banks' which is common for all. Because the impugned Insolvency Petitions were filed by SBI for itself and also on behalf of the said Joint Lenders Forum, already listed above, the names of all the banks forming consortium thus substantiate the fact that the financial creditors are common for the 15 debtor entities.
- XIV. Common Group of Corporate Debtors: As per the said two agreements the Debtors are combined together for the purpose of availing various loan facility. Therefore, this is a case where all the Debtors are independently as well as jointly liable for the repayment of loans facilities availed.

B. In case of Lavasa Corporation Limited (LCL), Warasgaon Assets Maintenance Limited & Dasve Convention Centre Limited

Hon'ble NCLT Mumbai bench comprising vide their order delivered on 26 February 2020, drawing parallels with the Videocon case, made the following observations.

"As has been mentioned in the Application of consolidation of LCL that most of the Resolution Applicants have put "Consolidation" as a pre- condition to Resolution Plan. Therefore, it would be harder to find a Resolution Plan for any of these Companies

on a stand-alone basis if the supply and demand from rest of the Companies is not guaranteed. However, if all the above-mentioned group Companies of LCL are resolved in a coordinated/ consolidated manner, a much more value maximising Resolution could be achieved.

This case for consolidation of CIRP of various LCL Group Companies is akin to Insolvency Resolution of different Videocon Companies by way of Consolidation of separate proceedings by treating the Corporate Insolvency Resolution Process (CIRP) as one for all these Companies. In case of State Bank of India Vs. Videocon Industries Limited, in MA 1306/2018 in CP(IB)-02/2018, vide a decision dated 08.08.2019, 13 yardsticks for looking into the rationality of “consolidation” was enumerated. We are inclined to test whether in case of LCL Group Companies those yardsticks/ criteria are being met or not. Each of the yardstick/ criterion and the manner in which it is being met in the case of Insolvency of LCL and its Group Companies are as under:”

The Hon’ble NCLT also took note of the following points:

- i. That CoCs had agreed for consolidation.
- ii. The fate of each of the 100% subsidiaries of LCL depended on the outcome of LCL’s CIRP. Given the substantial inter-dependence, no Resolution of Insolvency of LCL and its 100% subsidiaries was possible without consolidation resulting in a loss of huge value to all stakeholders and thereby defeating the objective of the Code.

Given the above, the bench ordered a Consolidated Corporate Insolvency Process of Lavasa Corporation Limited and its 100% subsidiary Companies viz. Warasgaon Asset Maintenance Limited and Dasve Convention Centre Limited, all of which are undergoing CIRP. As regards the other 100% subsidiaries which were NOT undergoing CIRP, the bench directed the Consolidated CoC of LCL, WAML and DCCL to take an informed decision regarding the Resolution of Debt of these companies.



ANNEXURE III

ABBREVIATIONS

- 1) AA : Adjudicating Authority
- 2) CD : Corporate Debtor
- 3) COC : Committee of Creditors
- 4) CIRP : Corporate Insolvency Resolution Process
- 5) EM : Evaluation Matric
- 6) EOI : Expression of Interest
- 7) FC : Financial Creditor
- 8) GI : Group Insolvency
- 9) IBBI : Insolvency and Bankruptcy Board of India
- 10) IM : Information Memorandum
- 11) IP : Insolvency Professional
- 12) IRP : Interim Resolution Professional
- 13) NCLT : National Company Law Tribunal
- 14) NCLAT : National Company Law Appellate Tribunal
- 15) OC : Operational Creditor
- 16) PRA : Prospective Resolution Applicant
- 17) RFRP : Request for Resolution Plan
- 18) RP : Resolution Professional
- 19) RA : Resolution Applicant
- 20) WG : Working Group





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