

Invocation of Group Insolvency



*The concept and practice of Group Insolvency in India has evolved through jurisprudence. In the absence of a legal framework for Group Insolvency, Adjudicating Authorities (AAs) have ordered CIRPs for the sister concerns of corporate debtors on a case-to-case basis to consolidate the CIRP proceedings of related CDs in greater interest of stakeholders. The jurisprudence of these cases became precedence for others. In this backdrop, the author deals with the Group Insolvency Framework after presenting a detail analysis of various judgements of NCLTs, NCLATs, Supreme Court in the light of related provisions of the Companies Act, 2013, Competition Act, 2002 (CCI) and IBC, 2016. Besides, the author also sheds light on various efforts of policy makers to introduce a fully-fledged Group Insolvency Framework under the IBC. **Read on to Know More...***



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1. Introduction

Insolvency and Bankruptcy Code, 2016 (IBC/Code) is in a rapid run to attain its goal. The judicial pronouncements by various benches of NCLTs and NCLATs on different issues are evolving jurisprudence around IBC. Accordingly, the IBBI and Ministry of Corporate Affairs (MCA) are constantly taking inputs from the jurisprudence and taking appropriate steps to amend the Code.

The insolvency framework under IBC deals with consolidation and amendment of the laws relating to reorganization and insolvency resolution of corporate persons. IBC defines that the words and expressions used but not defined in the Code but defined in the Companies Act, 2013 shall have the same meaning assigned to them under the Companies Act. Vide Section 255 and Schedule-11 of the Code, the provisions in the Companies Act, 2013 dealing with the stressed / sick companies went into various changes. IBC is based on following major legislations:

(a) Companies Act, 2013: The Companies Act deals with consolidation and amendment of the law relating to companies. On enactment of the Code, Sections 253 to 269, 270 to 323 & 325 dealing with revival, rehabilitation, winding up of the sick companies has been omitted from the Act and dealt with exclusively under IBC.

(b) Applicability of The Companies Act, 2013 Under IBC, 2016: IBC deals with Section 230 to 234 of the Companies Act, 2013 for compromises, arrangements, amalgamations during the Corporate Insolvency Resolution Process (CIRP) and sale of the CD as a Going Concern during Liquidation Process. The specific provisions deal with the Companies Act, 2013 are the sections 5(26), 18(f), 36(1)(3), 60(1)(2)(3)(5) of the Code, Regulations 36B(6A), 37, 39BA, 39C, of IBBI (IRP For CPs) Regulations 2016 and Regulations 2B, 32, 32A of IBBI (Liquidation Process) Regulations, 2016.

(c) NCLT and NCLAT : The NCLT and NCLAT have been constituted respectively under sections 408 and 410 of the Companies Act, 2013, which exclusively deals with the CDs under the Code. Specifically, under the sections 419, and 424, the NCLTs and NCLATs have been given powers to deal with the corporates under Companies Act, 2013 and IBC.

NCLT and NCLATs has wide powers under sections 5(1), 60, 61, 63, 64, 231, 238 of the Code and Rule-11 of the NCLT Rules-2016 and NCLAT Rules-2016 to deal with any matter arising out of the insolvency resolution of the CD under CIRP or Liquidation Process.

(d) The Competition Act, 2002 (CCI) & IBC, 2016: The CCI prevents practices having adverse effects on competition and deals with prohibition of certain agreements, abuse of dominant position and regulation of combinations. Under Section 410 of the Companies Act, 2013, appellate forum to deal with appeals under the Competition Act, 2002 is the NCLAT. IBC mandates CCI prior Approval under Section 31(4) of the Code in certain cases of approval of the Resolution Plan by the CoC.

On combined reading of all the above provisions, the NCLTs and the NCLATs have been vested with powers to deal with the Companies Act, 2013 and various processes under IBC, 2016. The NCLAT also deals with appeals connected to the Competition Act, 2002.

2. Working Group Report on Group Insolvency

The IBBI constituted a Working Group (WG) on January 17, 2019, to recommend a complete framework on Group

Insolvency to facilitate insolvency resolution and liquidation of companies in a group. The WG opined that the mechanisms in other laws, such as the schemes of arrangement under the Companies Act, 2013 may be used to deal with the special issues arising in group insolvency cases. It has finally recommended that in the first phase, the framework for group insolvency may cover only domestic insolvency of companies in a corporate group defined to include holding, subsidiary and associate

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companies in the form of procedural coordination.

3. Cross Border Insolvency Resolution Committee (CBIRC) Report on Group Insolvency

The CBIRC, constituted by the MCA, has submitted following recommendations on the basis of UNICITRAL Model Law for implementation of Group Insolvency:

- a) In the Group Insolvency Framework under the Code, a broad and inclusive definition of 'group' should be provided so as to include a large number of CDs within its ambit. The definition of 'group' may be based on the criteria of control and significant ownership. This definition should be applicable to all entities that fall within the definition of a 'corporate debtor' under the Code, i.e., companies and limited liability partnerships.
- b) The Group Insolvency Framework under the Code should only apply to CD in respect of whom a CIRP or Liquidation Process is ongoing through the procedural coordination mechanisms.
- c) Jurisprudence evolved out of the orders passed by the NCLT, the NCLAT and the Supreme Court of India is to be taken as an input to incorporate in the Code.

4. Types of Group Insolvencies

Substantial Consolidated CIRP	Procedural Consolidated CIRP	Lifting of Corporate Veil for fair CIRP
<ul style="list-style-type: none"> (i) All Assets and Liabilities of all the CDs are merged. (ii) Single CoCs for all CDs (iii) All debts / dues owing to other CDs Eliminated. (iv) All the obligations and guarantees executed by one or more CDs deemed to be one obligations of all CDs. (v) Common CoCs to be formed. (vi) Single Resolution Professional (RP) (vii) Common CIRP Date 	<ul style="list-style-type: none"> (i) Keeping both / all CDs assets separately. (ii) Separate CoCs for each CDs. (iii) Sharing information among the group CoCs. (iv) Common CIRP Date, (v) Appoint Single RP, (vi) Preparation of Information Memorandum by incorporating details connected to all the CDs, (vii) Calling for common EOI and issuing RFRP with Evaluation Matrix, (viii) Processing the Resolution Plan(s) received. 	<ul style="list-style-type: none"> (i) Bring in the assets of the other entity which is not CIRP along with the CD's asset for the purpose of the CIRP, (ii) Separate CoCs for each CDs. (iii) Lifting / piercing corporate veil for the purpose of common benefit / avoid fraudulent businesses practices

5. Factors considered for invoking Group Insolvency

Substantial Consolidated CIRP	Procedural Consolidated CIRP	Lifting of Corporate Veil for fair CIRP
<ul style="list-style-type: none"> (i) Common control, (ii) Common directors, (iii) Common assets, (iv) Common liabilities, (v) Inter-dependence, (vi) Interlacing of finance, (vii) Pooling of resources, (viii) Co-existence for survival, (ix) Intricate Link of Subsidiaries, (x) Inter-Twined of Accounts, (xi) Inter-Looping of Debts, (xii) Singleness of Economics of Units, (xiii) Cross Shareholding, (xiv) Inter dependence due to intertwined consolidated accounts, (xv) Common pooling of resources. <p>*Substantive consolidation allowed, only if extra-ordinary situation arises</p> <p>* In the Videocon matter, the Hon'ble NCLT excluded to include 2 CDs from the substantial consolidation for the purpose of CIRP but allowed to continue the individual CIRP due to the reason that both CDs can function independently.</p>	<ul style="list-style-type: none"> (i) Interdependence of: <ul style="list-style-type: none"> (a) Technology, (b) Intellectual Property Rights (c) Infrastructures, (d) Operational Link, (e) Raw Materials supply, (f) Finance, (g) Horizontal operational link, (h) Vertical Operational Link, (ii) Holding and 100% subsidiary company relationship, (iii) One CD's resolution depends on other CD's resolution. (iv) Necessity to lift the corporate veil. 	<ul style="list-style-type: none"> (i) Necessity to lift the corporate veil to protect the interest of the stakeholders, (ii) Giving necessary directions based on individual cases, (iii) Pooling of assets, (iv) Procedural coordination (v) Initiation of CIRP of the Group Company, (vi) On the request of Reserve Bank of India (RBI)

6. Jurisdiction to Invoke the Specific Group Insolvency

Substantial Consolidated CIRP	Procedural Consolidated CIRP	Lifting of Corporate Veil for fair CIRP
(i) Majority of the CoCs of All CDs, (ii) Reserve Bank of India (iii) Supreme Court of India	(i) Resolution Professional, (ii) Operational Creditors, (iii) Committee of Creditors, (iv) NCLT & NCLAT, (v) Reserve Bank of India, (vi) Supreme Court of India.	(i) NCLT, (ii) NCLAT, (iii) Reserve Bank of India, (iv) Supreme Court of India.

7. Provisions of the Code for Invoking Group Insolvency

Even though there are no specific provisions for Group Insolvency in the Code till date, courts have passed orders for Group insolvency after detailed analysis on case-to-case basis. After the order of Group Insolvency for Videocon by NCLT, Mumbai, the IBC (Amendment) Act, 2019 dated August 16, 2019, clarified the definition of 'Resolution Plan' under Section 5(26) to include provisions of restructuring of CD including by way of merger, amalgamation, and demerger.

In continuation, CIRP Regulation inserted with Regulation 37 (m) w.e.f. September 16, 2022, permits that

Through the IBC (Amendment) Act, 2019 an explanation was inserted in Section 5 (26) which clarified that a Resolution Plan may include provisions for the restructuring of the Corporate Debtor, including by way of merger, amalgamation, and demerger.

the Resolution Plan may contain sale of one or more assets of CD to one or more Successful Resolution Applicants (SRAs) submitting resolution plans for such assets; and manner of dealing with remaining assets. Further CIRP Regulation 39BA also inserted with provision for Assessment of Compromise or Arrangement while deciding to liquidate the CD u/s 33 and CoC to explore the compromise/ arrangements.

Substantial Consolidated CIRP	Procedural Consolidated CIRP	Lifting of Corporate Veil for fair CIRP
(i) Based on U.K./U.S.A. courts which have dealt with the process of consolidation along with the jurisdiction authority by pronouncing that equity and fairness ought to be a yardstick by lifting the corporate veil. The benefits should outweigh the disadvantages and for that burden of proof laid on opposing substantial consolidation. (ii) AA's power u/r 11 and Section 60(5) of the Code, (iii) U/A 32 & 142 of Constitution of India by Hon'ble SCI.	(i) AA's power u/r 11 and Section 31(4) of the Code, Section 60(1)(2)(3)(5) of the Code, (ii) Section 5(26) of the Code & Regulation 37, 38, 39BA, 39C of CIRP Regulations and Companies Act, 2013. (iii) Section 424 of Companies Act, 2013. (iv) U/A 32 & 142 of Constitution of India by Hon'ble SCI.	(i) AA's power u/r 11 and Sec-60(5) of the Code, (ii) U/A 32 & 142 of Constitution of India by Hon'ble SCI.

8. Jurisprudence on Invoking Group Insolvencies

There are several judgements passed by NCLTs, NCLATs and the Supreme Court, which exclusively dealt with the interplay between the Companies Act and Group Insolvency under IBC for value maximization and resolution of CDs.

In the matter of *Sanghvi Movers Limited (OC) Vs M/s. Albanna Engineering (India) Pvt Ltd., & Ors.*, NCLT, Kochin Bench held that assets and properties, including any claim, interest therein, of Albanna Engineering LLC (Dubai), Holding Company, which is not in CIRP held through M/s., Albanna Engineering (India) Pvt. Limited, WoS Company, Corporate Debtor will have said to be the property of the CD for the purpose of the CIRP.

NCLAT in the matter of *Y. Shivram Prasad Vs. S Dhanapal* in its decision observed that during the liquidation process the steps which are required to be taken by the liquidator include a scheme under Section 230 of the Companies Act, so as to ensure the revival and continuance of the CD. NCLAT took note of the fact that while passing the order under Section 230, the Adjudicating Authority (AA) would perform a dual role - one as the AA in the matter of liquidation under IBC and the other as a Tribunal for passing an order under Section 230 of the Companies Act. Following the decision of NCLAT, an amendment was made on July 25, 2019, to the Liquidation Process Regulations by the IBBI so as to refer to the process envisaged under Section 230 of the Companies Act.

In the matter of *M/S., Innoventive Industries Limited Vs ICICI Bank & Anr*, the Apex Court held that “the Code is an exhaustive Code on the subject matter of insolvency in relation to corporate entities, and is made under entry 9, List III in the 7th Schedule, S.No.9. Bankruptcy and Insolvency”. Further, in the matter of *Arun Kumar Jagatramka Vs Jindal Steel and Power Ltd., & Anr*, the Supreme Court held that there are three modes in which a revival is contemplated under the provisions of IBC (a) Part-II, (b) Sec-32(e)(f) of Part-III and (c) the scheme of compromise or arrangement provided in Section 230 of the Act of 2013 under Part-III. Importantly the Apex court recorded that, “Section 230 of the Act of 2013 (Companies Act) is wider in its ambit in the sense that it is not confined only to a company in liquidation or to corporate debtor which is being wound up under Chapter III of IBC. Obviously, therefore, the rigors of IBC will not apply to

proceedings under Section 230 of the Act of 2013 where the scheme of compromise or arrangement proposed is in relation to an entity which is not the subject of a proceeding under IBC”.

The Apex Court, in the matter of *Chitra Sharma and Ors. Vs. Union of India and Ors.*, passed order under Article 142 of the Constitution by lifting the corporate veil between the Jaiprakash Associates Limited (JAL) as holding company, and Jaypee Infratech Limited (JIL) as subsidiary company to protect the interest of home buyers. It further allowed the RBI's plea to initiate the CIRP against the holding company and to run the CIRP along with its subsidiary company.

To protect the interest of homebuyers in the matter of Chitra Sharma Vs. Union of India, the Apex Court invoked Article 142 of the Constitution of India to lift the corporate veil between Jaiprakash Associates Limited (JAL) and Jaypee Infratech Limited (JIL).

CBIRC-II Report on Group Insolvency explained that adopting a purely single-entity approach in the insolvency of group members may be divergent from the economic realities of the group as viewed by stakeholders. Practically, one company's insolvency pushes the other group companies also into insolvency by virtue of having multiple cross borrowings, guarantees business inter-linkages, co-mingles of assets, dependency etc. among the group companies and creditors. The Code comprehensively deals with the insolvency of corporate debtors as separate entities, but it does not envisage a framework to either coordinate insolvency proceedings of corporate debtors belonging to a group or to have a common resolution for them. To address this, the AA under the Code and the Supreme Court have passed orders enabling coordination of insolvency proceedings of group members in some instances or have applied general principles of corporate law pertaining to piercing of the corporate veil to make group companies liable for each other.

It is necessary to bring to the reference of a recent Land Mark Judgement passed by the NCLAT, Chennai Bench in the matter of *Mr. Dinesh Kothari Vs., RP & CoC of Pondicherry Extraction Industries Private Limited & CoCs of the JKS Banyaan Private Limited*, dated February 23, 2023, wherein the court rejected the appeal to consolidate CIRP of three CDs stating that the CDs failed

Substantial Consolidated CIRP	Simultaneous/Procedural Consolidated CIRP	Lifting of Corporate Veil for fair CIRP
<i>State Bank of India Vs. Videocon Industries Limited & Ors.</i>	<i>Edelweiss Asset Reconstruction Company Limited Vs. Sachet Infrastructure Pvt. Ltd. (Principal Borrower) & 8 Other CDs- Corporate Guarantors)</i>	<i>Chitra Sharma Vs. Union of India,</i>
Order Passed by Hon'ble NCLT, Mumbai Bench	Order Passed by Hon'ble NCLAT, New Delhi.	Order Passed by the Hon'ble Supreme Court of India
<i>TJSB Sahakari Bank Ltd.- F/C of AVAL & AVFL Vs. Mr. Kshitiz Gupta & Ors.</i>	<i>Oase Asia Pacific Pte Ltd.- - (Against Consolidation) Vs. Axis Bank Ltd & Other FCs, including CDs in CIRP</i>	<i>M/s Sanghvi Movers Limited, OC Vs., M/s Albanna Engineering (India) CD & M/s Albanna Engineering LLC. Dubai</i>
Order Passed by Hon'ble NCLT, Mumbai Bench	Order Passed by Hon'ble NCLAT, New Delhi.	Order Passed by Hon'ble NCLT, Kochi Bench.
<i>Jitender Arora, RP of M/s. Premia Projects Ltd., Vs., Tek Chand & M/s. Solitaire Infomedia Pvt. Ltd.,</i>	<i>RP of Uttam Galva Metallics Ltd., & Uttam Value Steel Limited Vs. CoCs of Uttam Galva & Uttam Value Steel Limited</i>	<i>Bikram Chatterji and Ors. Vs. Union of India (UOI) and Ors</i>
Order Passed by Hon'ble NCLAT, New Delhi.	Order Passed by Hon'ble NCLT, Mumbai Bench	Order Passed by the Hon'ble Supreme Court of India
<i>Mrs. Mamatha Vs. AMB Infrabuild Private Limited and Ors</i>	<i>Radico Khaitan Ltd., Vs. 1. BT & FC Pvt Ltd., and 2. Bangalore Dehydration and Drying Equipment Company Pvt. Ltd & Ors.</i>	<i>Jaypee Kensington Boulevard Apartments Welfare Association and Ors. Vs. NBCC (India) Limited and Ors</i>
Order Passed by Hon'ble NCLAT, New Delhi.	Order Passed by Hon'ble NCLAT, New Delhi.	Order Passed by the Hon'ble Supreme Court of India
<i>Reserve Bank of India Vs. SREI Infrastructure Finance Limited & SREI Equipment Finance Limited, CoCs of both SREIs</i>	<i>SMM Steel Re-rolling Mills Private Limited and Paragon Steels Private Limited</i>	<i>ArcelorMittal India Private Limited Vs. Satish Kumar Gupta and Others [(2019) 2 SCC 1]. (Lifting / Piercing of Corporate Veil)</i>
Order Passed by Hon'ble NCLT, Kolkatta Bench	Order Passed by Hon'ble NCLT, Chennai Bench	Order Passed by the Hon'ble Supreme Court of India

to meet the basic requirements for consolidation of CIRP, failed to satisfy requirements necessary for 'Consolidation'. No 'Assets' of a 'Corporate Debtor' can be sold as a 'standalone' unit and the sole CoC member with 100% voting rights rejected consolidation request.

9. Issues in Conducting Separate CIRPs

In some of the CIRP cases wherein the CDs have the operational structure that were inseparably linked to its subsidiary companies / joint ventures / holding companies / SPVs / Associate Companies. The order of CIRP without

the stages of appointment of RP, AA, CoC and RA. Else, significant value, time and efforts are wasted aligning 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 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. The Study underlines the benefits of having a Procedural Group Insolvency Framework in the initial stage for maximization/preservation of value of business or assets, timely resolution of distressed business in an orderly manner and balancing the interests of various stakeholders.

10. Actions by IBBI

In an article in quarterly Newsletter² of IBBI for Oct.-Dec 2022 “Group Insolvency: Harnessing Synergies” IBBI Chairman Mr. Ravi Mital has narrated the importance of Group Insolvency in the present global and domestic macro business environment and underlined the consequences of a company's default adversely affecting other companies of the group. Though the Code does not explicitly provide for dealing with Group Insolvency cases, AA attempted to consolidate the proceedings of such CDs where special issues arose from their interconnections with other group companies for the reason of higher possibility of revival and better value realization like the cases in Videocon, Era Infrastructure, Lanco, Educomp, Amtek, Jaypee, Adel Landmarks and other cases, argues Mital.

Chairman has quoted the Reserve Bank of India's (RBI), “Report on Trend and Progress of Banking in India 2021-2022”, where it is captioned that the default of one borrower is likely to spur cross defaults by the group companies due to cross obligations and credit risk mitigation coverage by parent and group companies. The Group Insolvency Framework, in which the resolution of borrowers belonging to the same corporate group if undertaken together could help in improving the efficacy of IBC. The WG and CBIRC have provided a blueprint of the Group Insolvency Framework in India. In this line, MCA has floated a consultation paper about Group

Insolvency for the domestic companies to be included in the Code.

11. Conclusion

Some of the major guidelines provided by IIIPI in its Study Group regarding procedural coordination in Group Insolvency are as follows:

- (a) Procedure to identify the entities forming part of the Group for Insolvency Resolution Process under the Code,
- (b) If one entity admitted into CIRP but other entity is not admitted in CIRP but if the Group entities are having strong interlinkages business model and management, with the intervention of AA, Procedural Group Insolvency may be initiated. If necessary, in some cases the substantial consolidated Group Insolvency may be ordered by AA.

The amendments required in the Code is to the extent of substantial consolidation of the group companies by pooling assets and liabilities of all companies into single book for the benefit of stakeholders.

- (c) The Creditors of the Group companies should carry out the review of group operations to finalise entities deemed to fit for inclusion in Group Insolvency process.
- (d) Specific forms and procedure under Section 7, 9 and 10 of the Code for filing application under IBC for Group Insolvency initiation to be introduced in the Code.
- (e) The AA to accept the Group Insolvency initiation applications and also allow inclusion of further entities if deemed appropriate by creditors within finite timeline.
- (f) The AAs support in facilitating effective administration of the proceedings in respect of appointment of IPs, insolvency process across group entities involved, conduct of hearing and approval of applications etc.
- (g) Appointment of one or more RPs for larger Group Insolvency matters, while appointing one lead RP,

² Insolvency and Bankruptcy News, IBBI, Oct. – Dec. 2022, p. 3.

who should be in control of the parent / main company, besides managing the Group Insolvency process.

- (h) The CoCs of all group entities to be constituted covering the FCs of all group entities and their inter-se voting power may be computed after taking into account their respective share(s) across group entities.
- (i) Appointment of valuers to provide the valuation of business assets for the group as well for individual entities.
- (j) All the public announcements, IM, RFRP, EM etc., to be presented on a group basis.

- (k) The RAs should be invited to bid for entire group only. RAs may be given flexibility to sell off any unrelated businesses of group entities.

In the nutshell, the provisions of the Companies Act, 2013, Competition Act, 2002, IBC, 2016, Work Group Report-2019, CBIRC Report 2021, jurisprudences all proves that there are already provisions for the procedural coordination to conduct the consolidated/ simultaneous CIRP of group companies. The amendments required in the Code is to the extent of substantial consolidation of the group companies by pooling assets and liabilities of all companies into single book for the benefit of stakeholders.

