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Group Insolvency and Cross-Border Insolvency

Guest of Honour at the Inaugural Session of One-Day Virtual Workshop on Group and Cross-Border Insolvency for Insolvency Professionals (IPs) on June 14, 2025.

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Shri Sudhaker Shukla, Former Whole Time Member (WTM), Insolvency and Bankruptcy Board of India (IBBI), looked after Research and Regulation Wing comprising Corporate Insolvency, Corporate Liquidation (including Voluntary Liquidation), Individual Insolvency and Individual Bankruptcy, Research & Publication, Data Management & Dissemination and Advocacy. In addition, he was also handling Human Resources, National Insolvency & Graduate Insolvency Programmes, Continuing Professional Education and Knowledge Management & Partnership divisions in the IBBI.

Shri Shukla served as a member of the Indian Economic Service (IES) for over 34 years in various capacities across Ministries and Departments of the Government of India. His last assignment was as Chief Economic Adviser in the Ministry of Rural Development. Earlier, he served as Adviser in African Development Bank. He has wide experience in dealing with various regulations.

On June 14, 2025, Shri Shukla delivered the inaugural address at the One-Day Virtual Workshop on Group and Cross-Border Insolvency for Insolvency Professionals (IPs), as Guest of Honour. In his address, he discussed various pros and cons of Group and Cross-Border Insolvency and highlighted its relevance to the IBC regime. ***Read on to know more....***

The futuristic reforms are ever evolving and an essential part of any vibrant ecosystem. The geo-political world order has continuously been under evolution. If we observe the trajectory of insolvency regimes in other jurisdictions, the progression has been from Individual Insolvency to Corporate Insolvency, followed by Group and Cross-border Insolvency. The current debate revolves around Group and Cross-border Insolvency, and going forward, the focus is likely to shift towards incorporating environmental concerns and dealing with cryptocurrency and digital assets in cross-border settings, alongside implementation of group insolvency frameworks.

International Experience

Adoption of futuristic aspirations depends upon stage of any country's economy, which may vary from one country to another. Debate in India, since 2018, has consistently recognized the need for Cross-Border Insolvency as a priority arguably, even before debate on introduction of group insolvency gained traction. In contrast, in advanced jurisdictions, the debate on Group Insolvency for interconnected enterprises started since first half of the 19th century onwards and group insolvency; much before cross border insolvency issues which came in focus since early 20th century. The debate was basically on what constitutes a group and why a group is needed as driver of the economic growth. The economic theories attributed the rise of group enterprises to several factors; it was argued that dominant market power and risk-taking entrepreneurship go hand in hand. Dunning's Eclectic Paradigm gives us a glimpse of what constitutes the importance of a group—basically, market ownership, locational advantage, and internalization of cost. Furthermore, hypothesis has been tested and proven that vertical and horizontal integration becomes vital in carrying forward the group's position in the international economic order. Multinational companies evolved and flourished with colonization. However, as nation-states got the freedom and emerged out of the grips of colonial powers, the need for cross-

border insolvency was mainly raised by the advanced jurisdictions to protect economic good associated with the multilateralism.

The United Nations Commission on International Trade Law (UNCITRAL) a subsidiary body of UN General Assembly, too, choose to bring its focus and building consensus through in-depth deliberations on Cross-Border Insolvency first and then discussions on Group Insolvency of interconnected group entities were initiated. For many countries of Global South such a sequencing is a debating point. The UNCITRAL Model Law on Enterprise Groups, 2019, states that "*Recognizing the need for a generally acceptable model law that would focus on insolvency proceedings relating to multiple debtors that are members of the same enterprise group, thereby extending the provisions of the Model Law on Cross Border Insolvency….".* Intention is not to find fault with the sequencing, but the point is being emphasised that option related to whether a particular jurisdiction intends to gain experience through experimentation with available best practices related to group insolvency before launching cross border dispensation or work on both simultaneously should be left with the wisdom of that jurisdiction.

Evolving Insolvency Regime in India

Offering plain vanilla options to begin with, the BLRC Report recommended to bring in complex processes later with the maturity of the insolvency eco-system. While section 234 and section 235 of the code refer the possibility of facilitating cross border cases, however, it is altogether silent on group insolvency dispensation. Adjudicating Authority by way of invoking inherent powers had covered a lot of ground in the space of dealing with group insolvency and cross border issues. On policy front, several background papers have been prepared which are in the public domain. Insolvency and Bankruptcy Board of India (IBBI) set up a Working Group on Group Insolvency headed by Mr. U K Sinha (2019) which was followed by Cross Border Insolvency Rules/Regulations Committee (CBIRC under the Chairmanship of Dr K P Krishnan (2020). Later the mandate of this expert Group was expanded to analyse Model Law on Enterprise Group (MLEGI). On sequencing issues both reports have suggested different approaches. Mr. Sinha Committee emphasized that *"The thrust of the framework is 'facilitation', 'flexibility' and 'choice'. It envisages 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".* On the other hand, Dr Krishnan Report recommendation state that the MLEGI may not be adopted at present, and its adoption may be considered after enactment of single entity cross border dispensation. Both reports align and converge to have cautious approach till necessary experience is gained in complex processes. If you see from the lens of convergence, both reports are basically saying the same thing with differentiated order of preference depending on maturity of systems. One says we cannot have a credible Group Insolvency regime without having Cross-Border Insolvency, while other focuses on experimentation with cross border before group entities come into focus. These are divergent but similar views. The emphasis on sequencing can't be more important than the context. The underlying context is to deliver the workable regime giving prominence to national interest and priorities.

Challenges in Implementation of Cross-Border Insolvency

It is important to ponder about factors which are impeding introduction of Cross-Border Insolvency in the country. The UNCITRAL model identifies its five pillars – nexus or control, recognition, cooperation, coordination, and reciprocity. These are now settled principles in many jurisdictions. All advanced jurisdictions acknowledge that such a framework gives a lot of flexibility in managing various nuances that could be faced by any regime. Despite having that flexibility, why has Cross-Border Insolvency not got the needed traction from most of the countries in the world as well as in India? About 60 countries have adopted it, but rest of the world is still thinking and manoeuvring its drawing board. This certainly raises doubts about uniformity in approach towards cross border dispensation across the jurisdictions.

We need to focus on issues especially in the context of our insolvency regime. Despite being high on

agenda aided by various expert committee reports and discussion papers since 2018, the concept is still shrouded in mystery. Now, the media reports say, that along with other amendments clarity on cross border dispensation will also emerge in the monsoon or winter session of the Parliament. But why have we taken seven years of pause and pondering before rolling out such a regime? The attributable factors, in my mind, are:

1. **Lack of Data and Research**: First reason is the dearth of data to establish its efficacy. As part of IBBI earlier we struggled to get credible studies across the world. We were in touch with the World Bank and other international agencies in the field of insolvency to get some sense of research inputs on the effectiveness of the Cross-Border regime in any country. At that time, we had only one study which said that foreign direct investments in the USA have increased in leaps and bounds after implementation of Cross-Border Insolvency. It appeared to be an overly simplistic statement to make without empirical backing. But yes, whatever its worth may be, at least this one study was available. Now, we are told by World Bank that one more study has come, and we are trying to lay hands on that.

2. **Jurisdictional Complexity**: Though I am not a lawyer but as an economist, I can see, various laws have their own evolutional history. Whether conventional, commercial, or criminal laws, all have evolved in given circumstances in the context of each jurisdiction. The country specific orientation reflects in the cross-border regimes as well. Even if cross-border dispensation is made applicable in India, how to deal with different laws of the land and their interaction with laws of other jurisdictions will be a important phenomenon one must watch for.

3. **Valuation Standards:** Third issue would be asset identification and associated valuation standards. India is yet to develop a set of robust valuation standards. We follow certain international valuation standards. ICAI was in the forefront to help us in designing valuation standards for the insolvency use-case in India, but I don't think these have seen the light of the day yet. If we don't have valuation standards and those are not uniform across countries, it would be very difficult to compare property valuations done in the US and India for the same kind of asset. Digital assets are also becoming very important in the international sphere. We don't have any framework to deal with them. The standard operating procedure (SOP) on digital assets is still evolving. The Reserve Bank of India (RBI) is talking about it, but we are not there yet. Advanced jurisdictions are already into digital asset valuation techniques. We also need to leapfrog in this area.

4. **Coordination of Procedures**: Each jurisdiction has different timelines and procedures. Whether Corporate Debtor is to be guided by Insolvency Professional (creditor in control) or by the promoter (debtor in control) is a clear distinction across different jurisdictions. Some jurisdictions, even without prescribed timelines, are ahead in terms of efficiency in respect of dealing the restructuring of stressed asset. We, despite having a robust timeline, are lagging on the front of adherence aspect. Differing timelines will open more arbitration and mediation issues. We are behind here too. The international arbitration hub has shifted from London to Singapore due to cost considerations. India needs to aim at being on the leaderboard. Institutional setup is coming up in Gujarat International Finance Tech City (GIFT City), which is a positive development. If we don't have such alternative arbitration dispensations, cross-border disputes will invariably end up in Singapore.

5. **Public Policy Exception**: IBBI's study available on its website reveals demonstratively that each country interprets public policy exceptions in its own way. On one end, you have the USA, where restrictions are minimal. On the other end, you have Japan, where almost everything is excluded in the name of public policy. Korea and Japan fall into that category. How to reconcile with this issue will be a thing to watch as we move forward.

Preliminary Developments on Group Insolvency in India

On Group Insolvency, most of you may recall that IBBI had recently brought out a Discussion Paper detailing certain features of Group Insolvency through subordinate legislation or Regulations. This was regarding facilitating joint hearings, appointment of a common resolution professional, information sharing protocols, and synchronized timelines.

The discussion paper was out, but seemingly got much resistance from the stakeholders who advised that we could not possibly tinker with the regime using regulations and modification of this magnitude needed to be carried out through legislative intervention only. Else, it would be challenged and tested in court, putting a question to its sustenance.

Principles Underlying Group Insolvency and Substantive Consolidation

In examining any group interconnectedness in any jurisdiction, it is be seen whether the principle of separateness is nominal/technical in nature or whether it lies at the heart of company law. Piercing the corporate veil would be difficult to sustain in the eyes of law. There are judgments in other jurisdictions that argue, one needs to look behind the veil before concluding about justification of separation between two legal entities. Indian judgments largely uphold corporate separateness as a core issue.

Even as Group Insolvency is not codified yet, case laws are emerging in India. For instance, the principles underlying and requiring consolidation have been documented in the Lavasa and few other judgments. Interlinkages, value of resolution, synergy of value, interdependence, and interlacing of finance have been identified as the key principles to consider.

For substantive consolidation, the World Bank's prescription is that it is possible only when there is an intent to defraud. But in the Videocon judgment, substantive consolidation was allowed based on common control, common directors, common assets and liabilities, pooling of resources, interlinking of debts, singleness of economics, and common financial creditors. If these conditions are satisfied, then substantive consolidation can be done.

Lifting of the corporate veil has also been dealt with by the NCLT in the matter of *Som Resorts Private Limited.* It underscores the same logic - if the intent is to defraud, the corporate veil can be pierced.

In conclusion I want to leave with thoughts that insolvency regime is ready to embrace the cross border and group insolvency dispensation within the framework of IBC. There is much needed clarity on concepts, approach and implementation strategy through amendment in Code, Rules and Regulations. Jurisprudence has already taken the lead. Hence, we all eagerly await the final announcements with the hope that related amendments will not be too prescriptive. Rather indicative framework will give the regulator enough flexibility for the course corrections as situation may warrant. I would like to end here leaving these thoughts in your creative minds to ponder over upcoming reforms.

Thank you very much for this opportunity and wishing IIIPI and the participants the best.