

Insolvency and Bankruptcy Board of India

Subject: Report of the Working Group on Group Insolvency

The Governing Board, in its 12th meeting held on 28th December 2018, while considering Board Note No. 41/2018, directed that the IBBI may set up a Group to come up with a framework for facilitating group insolvency. Accordingly, a Working Group on Group Insolvency (WG) was constituted under the Chairmanship of Mr. U. K. Sinha (Former Chairman, Securities and Exchange Board of India), vide order dated January 17, 2019, to submit a report recommending a complete regulatory framework to facilitate insolvency resolution and liquidation of CDs in a group.

2. To fulfil its mandate, the WG consulted several stakeholders and experts, and examined relevant legal and regulatory principles as well as both global and domestic market practices. The WG has submitted its report (“Report”) to the Board on September 23, 2019, recommending a framework to facilitate insolvency resolution and liquidation of corporate debtors in a group. The report is placed at Annexure.

3. In the present global and domestic environment, it is common for business to be conducted through groups of companies. General company law in India has recognized the prevalence of groups and has put in place mechanisms to view the group as a whole, for example, by requiring preparation of consolidated accounts or imposing liability on ‘shadow directors’ by deeming them to be officers of the company, while respecting the principles of ‘separate legal entity’ and ‘asset partitioning’.

4. With the introduction of the Insolvency and Bankruptcy Code, 2016 (Code), India consolidated the fragmented laws relating to reorganisation, insolvency resolution and liquidation of corporate persons. While the Code provides detailed provisions to deal with the insolvency of a corporate debtor (CD) on standalone basis, it does not envisage a framework to either synchronise insolvency proceedings of different CDs in a group or resolve their insolvencies together. Consequently, the insolvency of different CDs belonging to the same group is dealt with through separate insolvency proceedings for each CD.

5. The Insolvency Law Committee in its report in March, 2018 recognised the fact that there is no mechanism in the Code for combining proceedings against entities which are related through business, like associate or holding companies. It was of the view that *“treatment of group companies within insolvency laws is a complicated subject. The current system of insolvency law is new, and it may be too soon to introduce a complex subject, like the present issue. The UNCITRAL Legislative Guide on Insolvency Law also provides that the treatment of group companies is a very complex subject in relation to insolvency law and has multiple different approaches in different jurisdictions. Since lifting of the corporate veil in insolvency may affect corporate debtor entities significantly, this issue may be dealt with in the long-term once the present system is well established”*.

6. The Economic Survey 2018-19 took note of the complex issues involved in the insolvency of one or more companies in a group and stated that there is a need for a coherent approach to address information asymmetry, provide coordination and prevent delay and clogging up of insolvency infrastructure [paragraphs 3.72 and 3.73 of Chapter -3 (Monetary Management and Financial Intermediation) Volume – II]. The Survey referred to the Working Group constituted by IBBI and identified group insolvency as a reform in pipeline.

7. In the meantime, jurisprudence has also developed on the subject matter. Few decisions rendered by the Adjudicating/Appellate Authority to deal with special issues arising in group insolvency are as under:

(i) In *Venugopal Dhoot v. State Bank of India & Ors.*, the Principal Bench of the Adjudicating Authority ordered that all the matters regarding the insolvency resolution processes of multiple companies of the Videocon group will be dealt with by the same bench of the Adjudicating Authority for the purpose of “avoiding conflicting orders and facilitating the hearing” of these matters.

(ii) Subsequently, in *State Bank of India & Anr. v. Videocon Industries Ltd. & Ors.* the Adjudicating Authority ordered that the assets and liabilities of 13 group companies of Videocon should be substantively consolidated due to factors such as common control, common directors, interdependence, interlacing of finance, co-existence for survival, pooling of resources, etc.

(iii) Recently, in *Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd. & Ors.*, where a residential project was being developed by a CD acting as common developer in consortium with other CDs which were the land owners, the Appellate Authority held that “group insolvency proceedings were required to be initiated” against five companies that had been working as a joint consortium to develop a residential plotted colony. To enable successful development of this colony, the Appellate Authority ordered that “simultaneous ‘Corporate Insolvency Resolution Processes’ should continue against them under the guidance of same ‘Resolution Professional’” who should run the processes so that they are “completed in one go by initiating a consolidated ‘Resolution Plan(s)’ for total development”.

8. Only few countries in the world have certain frameworks dealing with the issues arising in group insolvency. In India too, no previous insolvency mechanisms have explicitly provided for a framework to deal with group insolvency. Given this, there is little international or domestic experience to rely on. However, some basic framework and recommendations are provided by some international organisation and few other countries, including (i) UNCITRAL Legislative Guide on Insolvency Law dealing with “Treatment of enterprise groups in insolvency”; (ii) The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, 2016; (iii) European Union, Germany and United States of America.

Report of the Working Group

9. The WG in its Report has reaffirmed the need for a legal framework to facilitate insolvency resolution and liquidation of companies belonging to a group. It has recommended a phased

implementation of the framework. The brief summary of the framework recommended by the WG is as under:

(i) The framework may be enabling, and may be voluntarily used by relevant stakeholders of the company. Only provisions relating to communication, cooperation and information sharing may be mandatory for insolvency professionals, Adjudicating Authorities and committees of creditors (“CoCs”) of the companies which belong to a group and have been admitted into CIRP.

(ii) For the purposes of this framework, a ‘corporate group’ may include holding, subsidiary and associate companies, as defined under the Companies Act, 2013. However, 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 definition of corporate group above, as well.

(iii) The framework may have certain rules against perverse behaviour. While the provisions enabling the avoidance of certain transactions and imposition of liability for wrongful and fraudulent trading may broadly be sufficient to capture intra-group transactions that are value destructive, the framework may permit the Adjudicating Authority to subordinate the claims of other companies in a group in exceptional circumstances of fraud, etc.

(iv) The law may enable phased implementation of the framework. The first phase may facilitate the introduction of procedural co-ordination of only domestic companies in groups and rules against perverse behaviour. Cross-border group insolvency and substantive consolidation could be considered at a later stage, depending on the experience of implementing the earlier phases of the framework, and the felt need at the relevant time.

(v) The framework may provide for procedural coordination in the first phase as under:

a. The framework may have the following elements of procedural co-ordination:

i. Joint application

ii. Communication, cooperation and information sharing

iii. Single insolvency professional and single Adjudicating Authority

iv. Creation of a group creditors’ committee, and

v. Group coordination proceedings.

b. A joint application may be made against all corporate debtors who have committed a default and who form part of a group. Other procedural coordination mechanisms may be made available to those companies who form part of a group, and have been admitted into CIRP.

c. While all other elements of procedural co-ordination may be voluntary, cooperation, communication and information sharing among insolvency professionals, CoC and Adjudicating Authorities may be mandatory for companies that have been admitted into CIRP.

10. This note is submitted for the information of the Governing Board.