

Group Insolvency: Harnessing Synergies

The Insolvency and Bankruptcy Code, 2016 (IBC/Code) introduced a time-bound mechanism for resolution of insolvency and bankruptcy cases in India. It consolidated the fragmented laws relating to reorganization, insolvency resolution and liquidation of corporate persons and individuals. The Code envisaged a collective effort not only to keep a distressed entity alive but also to maximize the value of its assets for benefit of all stakeholders. It provides in detail, a framework for resolution or liquidation of a corporate debtor (CD) on standalone basis but does not at present expressly deal with the insolvency proceedings of different CDs in a group.

A company is a separate legal identity with a set of well-defined rights and duties and powers and obligations. It possesses a separate identity distinct from its members and stakeholders. Thus, the stakeholders associated with a company assesses the risks and returns of a company on standalone basis and deals with it accordingly. On the other side, groups are a set of entities related either by economic dependencies or shared control or entities carrying on business in pursuit of common objectives. In the present global and domestic environment, it is common for businesses to be conducted through groups of companies which led to instances where financial position of one company impacts other companies in the group. Such instances result in defaults by one or more companies in a group and are categorized as 'group insolvency'. Though the Code does not explicitly provides for dealing with such cases, the Adjudicating Authority (AA) at several occasions, has attempted to consolidate the insolvency resolution processes of such companies because of the higher possibility of revival and better value realization. For instance, in the insolvency resolution of CDs such as *Videocon*, *Era infrastructure*, *Lanco*, *Educomp*, *Amtek*, *Jaypee*, *Adel Landmarks* etc., special issues arose from their interconnections with other group companies. This highlighted the need to examine the desirability and feasibility of having a framework for insolvency resolution of group companies.

Recognizing the need for a framework on group insolvency, the Insolvency and Bankruptcy Board of India (IBBI/Board) constituted a Working Group on Group Insolvency (WG) under the chairmanship of Shri U.K. Sinha. The WG was given a mandate to recommend a regulatory framework to facilitate insolvency resolution and liquidation of CDs in a group. Later on, a Cross-Border Insolvency Rules/Regulation Committee (CBIRC) was constituted by the Ministry of Corporate Affairs (MCA) under the chairmanship of Dr. K. P. Krishnan, to analyse UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI). The mandate of this Committee was to build on the work undertaken by WG and make recommendations governing the resolution of group enterprises for the purpose of IBC. The main recommendations are as under:

- i. A group insolvency framework to be laid down under the Code that is voluntary, flexible and enabling in nature. As part of this framework, provisions governing domestic group insolvency may be enacted in the first phase and cross-border group insolvency framework may be considered at a later stage.
- ii. The MLEGI may not be adopted in India at the moment, and it may be considered post enactment of cross-border insolvency laws for single entity and based on learnings and gaining experience from its implementation.
- iii. A broad and inclusive definition of 'group' should be provided so as to include a large number of CDs within the ambit of the framework. The definition of 'group' may be based on the criteria of control and significant ownership and to cover all CDs including limited liability partnerships, however, to exclude financial service providers.

- iv. The group insolvency framework under the Code should only apply to CDs in respect of whom a corporate insolvency resolution process (CIRP) or liquidation process is ongoing. The law should not apply to solvent members of the group.
- v. All proceedings related to CDs belonging to a group may take place under the same AA and a common insolvency professional (IP) may be appointed as the resolution professional (RP) or liquidator.
- vi. The Committee of creditors (CoC) and IPs appointed in respect of CDs belonging to the same group should mandatorily be required to cooperate, coordinate and share information with each other. A group CoC may be formed with adequate representation from CoCs of all group members to provide procedural assistance.
- vii. The need for substantive consolidation, i.e., provisions of pooling of assets and liabilities of an insolvent group may be contemplated at a later stage, based on practice and jurisprudence evolved in this regard.

The report of the WG and CBIRC has provided a blue-print of the group insolvency framework in India. The proposed framework for group insolvency is expected to promote information symmetry as it would enable the exchange of information between the stakeholders of different companies and thus, may lead to a better assessment of viability and increase the chances of resolution.

Experts have suggested that guidelines should be laid down to provide that where the default has occurred in interconnected entities and the creditors are common, the insolvencies may be initiated together with a common IP so that they are at the same stage and effective coordination is possible. In such cases, the Code may enable concurrent conduct and procedural coordination of their CIRPs through coordination in CoCs of CDs and a common IP. However, even in cases where the CoCs are different, it should be allowed to constitute a single CoC, if the creditors wish to combine the two or more CIRPs, particularly where group entities are inextricably interlinked. Entwining interconnected group entities under insolvency as a single economic unit would augment the overall asset value of all CDs ensuing better outcomes with improved synergies and synchronised resolution.

Considering that a default of one borrower is likely to spur cross defaults by group companies due to cross obligations and credit risk mitigation coverage by parent and group companies, the Reserve Bank of India (RBI) in its 'Report on Trend and Progress of Banking in India 2021-22', expressed that "A group resolution framework, in which the resolution of borrowers belonging to the same corporate group if undertaken together, could help in improving the efficacy of the IBC".

The IBC is a relatively new legislation in India. Like any other economic law, in order to remain relevant with the changing dynamics of the market, the Code has undergone several amendments and it still continues to be a 'work in progress'. Stepping forward, the MCA on January 18, 2023, has floated a consultation paper on the changes being considered to the IBC. In the said consultation paper, keeping in view the benefits of dealing with interdependent entities in a consolidated manner in terms of improved procedural coordination, cost efficiency, higher possibility of revival, better value realisation, and value maximisation for the creditors of the entire group, framework for resolving domestic group insolvency has been proposed to be introduced in the Code. The proposed group insolvency framework is a step towards strengthening the functioning of the IBC and will further refine the current insolvency resolution landscape in India.

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