V. GROUP INSOLVENCY: TIME TO STOP RELYING ON THE JUDICIARY TO FILL A LEGISLATIVE LACUNA?

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ABSTRACT

The Insolvency and the Bankruptcy Code, 2016 ("IBC"), though a comparatively new legislation of the country has developed a massive jurisprudence in merely five years. Considering the intricacies involved in the insolvency process, IBC has been subjected to various amendments and changes, and yet the legislation has failed to accommodate for more complicated transactions like cross-border insolvency and group insolvency matters. Exclusion of such areas have provided for a major lacuna in the scope of IBC and led to academic, judicial and legislative debates and discourses. Groups and conglomerates are becoming exceedingly popular and play an integral role in the national and the global corporate world. However, the lack of provisions addressing group insolvency resolution provision in the IBC, have forced and promoted the need of judicial interpretations and widening of scope of the existing provisions. Judicial interpretations though important in places of legislative lacuna, has led to conflicting interpretations of the statute. The question or the problem that remains with introduction of the provisions regarding group insolvency is whether the corporate veil can be pierced by force of law when there is no public interest or malafide intention on the part of the corporate entity. The paper seeks to understand the application and scope of group insolvency proceedings in various jurisdictions and specifically in India, and attempts to answer the question that whether it is time to introduce the provisions regarding the same in our domestic legislation and dwells on the aspects required to be kept in mind before such addition and inclusion.

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I. INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 **("IBC")** has a robust jurisprudence with an aim to consolidate and align all the fragmented laws and provisions regarding dissolution and revival of bankrupt or insolvent persons. Before the enactment of the IBC, the framework for dealing with insolvency and restructuring procedures with respect to corporate entities, individuals, and firms was extremely complex, tiresome, and extended from the Companies Act, 2013 to the Sick Industries Companies Act **("SICA")** and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 **("SARFAESI Act")** among others. This led to a severe delay in the valuation of assets and made the whole process redundant.[1] The IBC sought to revolutionize the whole process and simplify it for businesses to either go for dissolution or revival.

One of the major objectives of the legislation was to ease out the complete process of resolution, therefore, the insolvency resolution of group companies as a whole cannot be neglected. A "Group" is an economic entity and consists of a set of companies, either controlled by one common administrative or financial head, wherein the companies are involved in businesses in different markets.[2] Groups as a form of an organizational

[1] Sachin Gupta, India: The Journey of Insolvency and Bankruptcy Code, MONDAQ https://www.mondaq.com/advicecentre/content/3750/The-Journey-of-InsolvencyBankruptcy-Code.
[2] Asli M. Colpan & Alvaro Cuervo Cazuraa, Business Groups as an Organizational Model, BUSINESS AND MANAGEMENT (2001).

structure are becoming extremely popular. Moreover, companies that are part of a group do not work in one market, and merely because one company declares insolvency, does not correlate, or translate into the group turning insolvent. Therefore, it is better for the creditors of the company to know the position of the assets of the group for a clearer position with respect to their debts.[3] Group Insolvency is essentially a mechanism to consolidate multiple cases against different companies of a single group that could affect the corporate debtor and creditors and thereby lift the corporate veil.[4] It is a complex matter in India, keeping in mind that there are no clear provisions with regards to the same in the IBC.[5]

This paper is divided into five chapters, the first chapter is the introduction, the second chapter deals with the need for group insolvency provisions, where it caters to the questions of what is group insolvency and what effect does it have on the concept of separate legal personality, specifically keeping in mind the report released by the Insolvency and Bankruptcy Board of India (**"IBBI"**). The third chapter discusses the various provisions in other jurisdictions and talks about the rules and regulations regarding group insolvency as provided under United Nations Commission on International Trade Law (**"UNCITRAL"**) Model with regards to the same. The fourth chapter talks about the position of group insolvencies in India and the approach adopted by the Tribunals and Courts while dealing with the same. Finally, the last chapter concludes the article and suggests some

[3] Raghuram Manchi, *A New Case Law relating to Group Insolvency*, IBC LAWS (May 10, 2020), https://ibclaw.in/a-new-case-law-relating-to-group-insolvency-by-raghuram-manchi-insolvency-professional/.
[4] *Supra* note 3.
[5] MINISTRY OF CORPORATE AFFAIRS, REPORT OF THE INSOLVENCY LAW COMMITTEE (2019) ¶ 17, Annexure II, 83.

recommendations that can be adopted in the Indian legal system to assist and develop group insolvency proceedings.

II. NEED FOR GROUP INSOLVENCY PROVISIONS

A. What is a Group and Group Insolvency?

Groups are essentially a set of entities, either related by an economic dependency or based on the control for the pursuit of common goals and objectives.[6] In the Indian context, groups can also be bound by formal or informal ties in a constellation like structure that may act in a coordinated manner.[7] For example, the Tata Group, though acting in diverse markets and with independent management, continues to be tied because of the majority holding of Tata Sons Ltd. in most companies and the Tata Group.[8] The main objective of a grouped corporate structure is to utilize the energies and internal synergies of each company efficiently. The synergies of a company can include information technology, supply chain, research and development projects among other things. Thus, the collaboration of different companies will not only improve the individual performance of each company but also of the group as a whole.

Further, grouping helps companies with regards to ring-fencing of assets and liabilities, wherein each company of the group has limited liability and there is a separation and reduction of risks for the group. The separation

[6] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, REPORT OF THE WORKING GROUP ON GROUP INSOLVENCY 12 (2019).
[7] T. Khanna & J.W. Rivkin, Estimating the Performance Effects of Business Groups in Emerging Markets, 22 STRATEGIC MANAGEMENT JOURNAL, 45-74 (2001).
[8] Steen Thomsen, Trust Ownership of the Tata Group, COPENHAGEN BUSINESS SCHOOL (2011).

of assets also eases the process of sale as the group does not need to be involved with the company directly and the sole decision of the sale of assets of one group company does not affect the other companies. A group system also has regulatory advantages with regards to ease of administration and tax benefits considering that group companies generally are provided with certain exemptions and reliefs and can claim for a group loss.[9] Additionally, it is important to note that creditors prefer giving loans to a company belonging to a group because lending is more secure given the intra-group capital marker and the investment is less likely to face financial distress.[10]

It is estimated that groups account for nearly 56% of the combined assets and about half of the revenue and profits generated in India in 2015-16.[11] The substantial position of corporate groups in the Indian market has led to the difference in treatment of the entities as separate legal personalities. The major point to be noted for this differential treatment is the effect of the same on the decision of the investors.[12] In this regard, group insolvency is a legal framework through which multiple companies of a corporate group are declared insolvent and the Court, merges or consolidates all the cases and creditors to achieve the greatest advantage for all stakeholders.

Group insolvency proceedings inherently require the lifting or piercing of the corporate veil to determine the controlling group of the entities. The

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[9] Darwin Gray, *What are the Benefits of a Group Company Structure?*, BUSINESS NEWS WALES (Aug. 7, 2019), https://businessnewswales.com/what-are-the-benefits-of-a-group-company-structure/.
[10] *Supra* note 6.
[11] Krishna Kant, *The end of conglomerates?* BUSINESS STANDARD (Mar. 17, 2017, 7:36 PM), https://www.business-standard.com/article/companies/the-end-of-conglomerates-117031700943_1.html.
[12] MINISTRY OF FINANCE AND COMPANY AFFAIRS, REPORT OF THE COMMITTEE ON THE COMPANIES BILL 1997, ¶ 5.5 (2002).

entities are majorly mere subsidiaries with a holding organization or an entity. Therefore, such piercing of the veil without the grounds of fraud, tax evasion, or criminal wrong committed, is a clear violation of the concept as according to *Solomon v. Solomon.*[13] The Companies Act, 2013 has specific provisions which require conglomerate companies to prepare a consolidated financial statement of all the subsidiaries and associated companies during the process of insolvency.[14] Furthermore, the Act also recognizes the concept of a shadow director, who is a person holding an office that puts him in a position to affect the actions of the directors.[15] Lastly, the Indian jurisprudence has a plethora of cases where the Courts have lifted the corporate veil in cases of insolvency to hold the parent company responsible for the actions of the subsidiaries.[16] Therefore, the provisions of group insolvency, though an exception to the principle of piercing the corporate veil, are nevertheless a necessity and must be adopted as a part of the legislation. Adoption of such provisions will ease out and clarify the Insolvency Resolution Process (**"IRP"**) to be followed, the circumstances that need to be looked at and the thresholds that need to be achieved for group proceedings to be taken forward which will benefit both the corporate creditors and the debtors.

On the flip side, various jurisdictions like Japan, the United States of America and India among others have continued to shy away from adopting group IRP provisions considering that piercing of the corporate veil would demotivate businesses from initiating resolution processes as well as from

[13] Solomon v. Solomon [1896] UKHL 1, [1897] AC (HL) 22.
[14] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 129(3).
[15] *Id.* § 2(60).
[16] Rishi Shroff & Shwetank Ginodia, A Corporate Governance Perspective on Lifting the Veil in Group Companies in India and the United Kingdom, 25(12) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 423 (2014).

setting up group structures involved in different industries which would impair the commercial strength of the country. Separation of the IRP thus helps to safeguard the assets of the whole group and the process is always initiated against the one company. This protects other businesses of the parent company from being dragged into the mess of insolvency. Additionally, separation of processes is advantageous to the resolution professional as he would not have to look into other companies that are not insolvent or involved in the process. Despite certain advantages to the separation of the process, which include simplicity, the complications and difficulties faced in the resolution of companies with interlinked businesses are supervening and therefore, the need for provisions for consolidating the process cannot be denied or ignored.

B. Need for Such Provisions in Legal Proceedings

Considering the Pandemic and the increased number of companies becoming insolvent, the ease and strength of the insolvency procedure becomes all the more important. Further, it is also important to note that most conglomerate structures work in different markets and there is a great inter-relationship or interdependency between the different entities.[17] Such entities may be dependent on each other for operational or financial help, which can include providing raw material or inter-group loans and aids, making them creditors and debtors of each other.[18] Hence, such interlinkages make it extremely difficult for shareholders, creditors and insolvency professionals to

[17] UNCITRAL, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, PART THREE: TREATMENT OF ENTERPRISE GROUPS IN INSOLVENCY ¶ 93 (2012).
[18] *Supra* note 6, at 13.

look at the situation of the companies objectively and without duplication of efforts and data.

Additionally, these inter-linkages are also difficult to disentangle as the main purpose or objectives of groups is to use internal synergies for the best of the group and in this case, the group is looked at as a going on concern to achieve value maximization.[19] In the case of *Amtek Auto*[20] where instead of the resolution of all the three units of the group, only one was resolved, but due to the interdependency of the three units, the general corporate world is of the opinion that resolution of all three would have been more valuable to the stakeholders.[21] The Amtek IRP has been going on for about five years now, with multiple resolution plans proposed by investors which were either rejected by the Committee of Creditors (**"CoC"**) or judicial authorities on various grounds like force majeure and frivolous claims by the investors. A common IRP would not only have expedited the process considering that the businesses are extremely interdependent but also brought all the creditors and investors on a common platform to arrive at an amicable and value-maximizing resolution plan. This shows the dire need for a proper group insolvency procedure to achieve the best value for the creditors and the companies.

Another important factor to be considered is the growing digital and globalized economy. Cross-border transactions have become increasingly

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[19] *Id.*

[20] Corporation Bank v. Amtek Auto Limited, C.P. (IB) No. 42/Chd/Hry/2017- decision dated 24.07.2017.

[21] Deborshi Chaki, *Creditors may offer to sell Amtek Auto along with subsidiaries*, LIVEMINT (Feb. 27 Feb, 2018) https://www.livemint.com/Companies/B0iQvSkRcVZrdj2Xoxoa7I/Creditors-may-offer-to-sell-Amtek-Auto-along-with-subsidiari.html.

common, where either the group or one or more of the subsidiaries are registered either outside the country or vice versa. These multi-jurisdictional companies are majorly looked at as one single entity which motivates the creditors to increase their investment.[22] India lacks a robust mechanism for cross-border insolvencies and treats each of the entities in a group separately. This system gives smaller creditors little to no say in the IRP, as a resolution requires a 66% majority in the CoC,[23] thereby reducing the effective say of a single small creditor and making it extremely difficult for them to get an ideal resolution for their investment.

The third reason is the nature of the transaction between entities of groups because it is the transaction that leads to asymmetry in the information that is provided to the stakeholders. In the case of *Venugopal Dhoot v. SBI,*[24] fifteen companies of the Videocon group underwent an IRP and the parties sought to consolidate all the matters on the ground that the companies were highly interlinked, in regards to functioning and finances, and the lack of consolidation would lead to undue delay and have an adverse effect on the valuation of assets and liabilities. It is pertinent to note that the major business areas of the group are limited to consumer home appliances, telecom and foreign oil and gas business and out of the 15 companies, 13 companies that were brought under a consolidated IRP were dealing in consumer home appliances business and had taken a common borrowing from a group of lenders. Therefore, the National Company Law Tribunal (**"NCLT"**) while accepting the plea of the Petitioners, noted that out of the 15 companies, the 13 companies had common control, common directors, common assets and

[22] *Supra* note 6, at 15.
[23] The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 § 30(4).
[24] Venugopal Dhoot v. SBI, CA- 1022(PB)/2018- decision dated 24.10.2018.

liabilities and majorly pooled their resources giving rise to a common group of financial creditors and corporate debtors. Further, the consolidation turned out to be a good prospect as it not only brought the proceedings being conducted in different NCLTs under one authority but also enabled the banks to be able to recover nearly 80% of the debt.

Additionally, according to the IBBI Working Group, group insolvency provisions in the IBC are required owing to the following reasons:

- Promotion of symmetrical information availability – Different companies of a group maintain different books of accounts and there is a high possibility that their methods of accounting may also differ. When multiple companies of a group undergo an individual IRP, comparison and tallying of accounts would not only be a cumbersome process but also be confusing and ambiguous, leading to information asymmetry. The core or the crux of an IRP is to maximize the welfare of the debtor and the creditors and unambiguous books of accounts reduce the stakeholder's risk to be misled and increases the chances of a viable assessment.[25] Therefore, group IRPs will provide symmetrical information to the stakeholders.
- Reduction in the costs of insolvency process – IRPs are expensive as they require the hiring of professionals, legal advisors and court and tribunal fees. Individual IRPs can lead to duplication of work and involvement of multiple professionals which could make the process even more elongated. Through a group IRP framework, companies will not be dealt with in

[25] *Supra* note 6, at 20.

isolation, therefore reducing the monetary and non-monetary costs involved in the process.[26]

- Value maximization - The purpose of the insolvency resolution framework is to increase the value of the assets of the company/companies for the creditors and generally increase the efficiency of the general process to help maximize the synergy of the company. Group insolvency frameworks would allow the complete group to use and allocate their internal synergies in the most efficient manner and thereby resolve the process quicker and in a more cost-efficient manner.

There are various other reasons which can be used as arguments in favour including a reduction in capital costs, increased certainty of returns for stakeholders, cost efficiency, fairer resolution for smaller stakeholders among others which can be highlighted as far as the need for group insolvency laws is considered.

III. GROUP INSOLVENCY IN FOREIGN JURISDICTIONS

The concept of group insolvency is not new to the world of global corporate law as legislations across the world have discussed the issue and formulated procedures for the same.

Chapter V of the European Union Regulations on Insolvency (**"EU Regulations"**) has been dedicated to the insolvency procedure of group companies. Article 56 of the EU Regulations discusses how the insolvency practitioner should look into consolidating and coordinating the insolvency affairs of two or more members of a group company and administer them

[26] *Id*; 'Tackling Group Insolvency' in Vidhi Centre for Legal Policy & EY, Insolvency and Bankruptcy Code: The Journey so Far and the Road Ahead (2018).

together.[27] The insolvency practitioner can also approach and request the court to hold a group coordination proceeding for the group members regarding whom the insolvency process has been initiated.[28] The court might open the group coordination insolvency process when it is satisfied that the process will help in better administration and would not result in a disadvantage to any creditor.[29] The notice shall then be given to the insolvency practitioner and the coordinator about the same. Even the Preamble of the EU Regulations specifies how group insolvencies should be promoted to ease the administration.[30]

Further, the UNCITRAL Guide also recommends that in cases of group insolvencies, there should be proper sharing of information among the members of the group companies and a common insolvency representative for the role of coordination and administration of affairs of the insolvent companies, such as handling the meetings with the CoC, disposition of assets and others.[31] The World Bank Principles on Effective Insolvency and Creditor/Debtor Regimes (2016) establishes a process for consolidated resolutions plans formulated by the insolvent organizations of the group company and issues recommendations regarding the participation of the solvent organizations of that group company in the IRP to contribute through their assets.[32]

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[27] Regulation (EU) 2015/848, of The European Parliament and of the Council of 20 May 2015 on insolvency proceedings, 2015 O.J. (L 141/19) art. 56(2).
[28] *Id.* art. 61.
[29] *Id.* art. 68.
[30] *Id.* ¶ 52 & Preamble.
[31] UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups in insolvency* (2012) ¶¶139, 140.
[32] World Bank, *The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes* (2016), Principle C 16.

In Ireland, the Companies Act, 1990 specifies that if the court finds it justified and equitable to include solvent group companies in the IRP, then the same shall be done to assist the liquidator in the winding-up process.[33] However, such inclusion of the solvent company in the IRP must be with regards to the conduct of the two companies, their interdependency and the role of the solvent company in regards to the debt provided by the creditors.[34] In presence of such instances, the solvent company will be asked to become a party to the insolvency proceedings. It further suggests the appointment of a single insolvency representative, for all companies, to avoid conflict of interests and ensure smooth conduction of the IRP.[35] A joint application by the creditors for the insolvency proceedings is also suggested for similar reasons.[36]

As India lacks legislation regarding group insolvency proceedings, deriving from the EU and recommendations of the UNCITRAL Guide, the Working Group On Group Insolvency suggested in their Report that there should be a joint application made for the initiation of the process, a single adjudicating authority, a single insolvency practitioner and coordination and communication among the stakeholders.[37] Procedural coordination will result in a speedy remedy for the companies as well as the stakeholders, especially the creditors.

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[33] Companies Act 2014 (Act No. 38/2014) (Ir.), http://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/html, § 140(1).
[34] *Id.* at § 140(2).
[35] *Supra* note 32, Recommendation 232-236.
[36] *Supra* note 32, Recommendation 200.
[37] *Supra* note 6, ¶ 1.3.1,

Moreover, the major question that persists is regarding the extension of liability of a subsidiary company to its holding company in cases of insolvency of that subsidiary company. This principle arises out of the fact that there exists a relationship between ownership and control.[38] However, the question that remains is whether the parent company will continue to bear the penalties for breaches of the subsidiary company in case of group insolvencies. In Australia, the holding company is made liable for the debts of the subsidiary company, if the subsidiary company has become insolvent as a result of such debts or was insolvent while taking the debts.[39] However, it is interesting to note that, although the legislation makes the holding company liable for the debts of the subsidiary company, it does not specifically talk about such liability in cases of group insolvency.

The UNCITRAL in this respect has not mentioned much in its Guide for Group Insolvencies[40] but has highlighted that mere control of a company over others should not result in the integration of the proceedings. In the United Kingdom, the Extension of Liability Principle is applied in a rather different way. The Courts in the UK while interpreting the principle have held the directors of the company to be liable for the insolvency of the company, as they are the ones who agreed to take steps that have led to such insolvency.[41] Although, the UNCITRAL Guide on Group Insolvency has discussed that directors can be made liable only when they have been an active part in the

[38] *Supra* note 32, ¶ 96.
[39] Corporations Act 2001 (Cth) s 588V (Austl.).
[40] *Supra* note 32, ¶ 98.
[41] VANESSA FINCH, CORPORATE INSOLVENCY LAW PERSPECTIVES AND PRINCIPLES, (Cambridge Publications 2nd ed., 2009) 590; Insolvency Act 1986, c. 45, § 214(2) (Eng.).

management of the controlled group company or has a direct relationship between the insolvency and management of the group company.[42]

Thus, India can incorporate such extension of liability of companies to their holding companies as we saw in the *ArcelorMittal Case*[43] (as discussed further) and in the Australian legislation.

IV. INDIAN PERSPECTIVE ON GROUP INSOLVENCY

The IBC has provisions for insolvency of corporate debtors but is silent about group insolvency proceedings. Professionals have believed that considering the nascent stage of the IBC in India, the introduction of group insolvency provisions would be a hasty step and could disrupt the balance between debtors and creditors.[44] However, the lacuna present has been challenged and brought before courts and tribunals multiple times. The question that has been sought to be answered throughout the established Indian jurisprudence is whether the assets and liabilities of a holding company or other companies in a group be held accountable for the IRP of a single subsidiary company. The reason for the reluctance of the legislators to include such a provision is the limited scope of piercing the corporate veil in the Indian Jurisprudence.

The Supreme Court in *ArcelorMittal India v. Satish Kumar Gupta,*[45] categorically stated that the principle of a separate entity is essential to the smooth functioning of businesses. However, where a statute requires or in cases where protection of public interest is of paramount importance or where

[42] *Supra* note 32, ¶ 99.
[43] ArcelorMittal India v. Satish Kumar Gupta, (2019) 2 SCC 1.
[44] *Supra* note 3.
[45] *Supra note* 44.

an entity has purposefully acted in a manner to evade the obligations of the Law, the Courts have the power to pierce the corporate veil and disregard it.[46] The Court further held that the disregard of the principle can also be done for group companies where it is extremely important to look at the economic position of a group to understand the bigger or entire economic position of the entity and the group.[47]

The case of *State Bank of India v. Videocon Industries Ltd*,[48] was the first case regarding consolidation of insolvency proceedings for group companies wherein the NCLT clubbed or grouped 13 out of the 15 companies in favour of the claim of the consortium, into a single entity as the common debtor. Generally, the practice followed by different jurisdictions regarding group insolvencies can be divided into two broad forms - procedural coordination or substantive consolidation.[49] Substantive consolidation is the process that can be adopted only when the entities are highly interlinked with regards to staff, management, manufacturing process, funding, etc., and therefore, segregation of the process of insolvency would be detrimental to the interests of creditors and affect value maximisation negatively.[50]

On the other hand, procedural coordination is the integration of the processes of insolvency and indebtedness for various group companies while keeping the assets exclusive to each company.[51] This mechanism can take

[46] *Id.*
[47] *Id.*
[48] State Bank of India v. Videocon Industries Ltd, M.A 2385/2019 in C.P.(IB)-02/MB/2018 (2019).
[49] *Supra* note 6.
[50] State Bank of India v. Videocon Industries Ltd, M.A 1306/ 2018 & Ors. in CP No. 02/2018 & Ors. (2019) ¶ 82.
[51] *Supra* note 6, at ¶ 24.

different forms but majorly involves the appointment of one or the same insolvency representative, a common CoC, cooperation between the courts and judicial proceedings including the hearing of the matter, the communication of the representatives, the negotiation process, submission and verification of claims and documents, among other things.[52] India has adopted the procedural coordination method as evident from its judicial pronouncements.

The major benefit of adopting this mechanism is the ease in the consolidation of the information of the companies, which includes information about the assets and liabilities, the creditors, and the general financial status of the company and the group as a whole. Another advantage of this mechanism is that it provides for an overall perspective with regard to the decisions on the reorganisation or sale of the debtor's businesses and provides clarity in the negotiation process, thereby helping in value maximisation.[53] The process adopted in India, however, requires a greater level of coordination between courts, insolvency professionals, creditors and the entities, to ensure accurate and efficient collection of data and information.[54] However, achieving such coordination is extremely difficult due to the lack of an established procedure in the Indian Legislation.

The lack of specific provisions for group insolvency has forced the NCLT to try and interpret various sections of IBC in a manner so as to accommodate and allow consolidation of the processes as well as ease the initiation process against the group. A close examination of certain sections of

[52] *Supra* note 32, ¶ 23.
[53] DIRECTORATE GENERAL FOR INTERNAL POLICIES, EU PARLIAMENT, Insolvency proceedings in case of groups of companies: Prospects of harmonization at EU level (2011).
[54] *Supra* note 32, ¶¶22-25.

the IBC elucidates the provisions that can be used in favour of group insolvencies.

For example, Section 60(2) and Section 60(3) of the IBC state that the IRP of a debtor company and any of its guarantors should be taken up by the same Adjudicating Authority (**"AA"**).[55] These provide for an exception and state that in case there is an ongoing IRP before any bench of the NCLT or any other Court, any application for clubbing the two processes can be presented, and then the Tribunal or Court can transfer the same to the AA handling the matter.[56] The provision allows and provides for an opportunity to the Courts or Tribunals to club together the proceedings of the companies where the debtor company and the guarantor belong to the same group of industries.

Further, another approach that can be utilised to bring group entities under the ambit of a single insolvency proceeding is to widen the scope of the term "related party" under Section 5(24) and 5(24A) of the IBC. The definition clearly mentions that when any person of one corporate entity such as a director, partner or key managerial personnel or his relative has substantial control over the working of another entity, either a partnership or any company, then such corporate entities can be said the related parties of the corporate debtor.[57] The exhaustive interlinkage between two entities as provided for in the definition makes it easier for the Court to link companies of the group.

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[55] *Supra* note 24, §§ 60(2)-60(3).
[56] *Id.*
[57] *Id* §§ 5 (24), 5(24).

Section 18(f) and Section 36 of the IBC also facilitate in smooth transition and clubbing of the proceedings as they specify that the shares of the subsidiary company should be transferred to the resolution professional and the liquidator of the holding company. This is done to ensure that the consolidation of the shares of all the relevant group companies will help the insolvency professional to fasten the process and look for the total liabilities accordingly.[58]

The NCLT in the S*tate Bank of India v. Videocon Industries Ltd,*[59] adopted a similar approach as mentioned above and tried to pierce the corporate veil. The main reason that the Tribunal ordered for consolidating the proceedings was that the assets and liabilities of all the companies were closely interlinked and intertwined and the lending was done on the assumption that the corporate debtors would be jointly and severally liable for the lending. The NCLT laid down a two-fold test in order to determine whether consolidation of the IRP can be carried:

a. A *prima facie* existence of elementary governing factors; and

b. Categorisation based on the governing factors.

The NCLT also enlisted the conditions that must be checked before bringing together the proceedings of the companies - common control among companies, multi-layer subsidiaries, basic common assets and liabilities, common directors, pooling of resources, common financial creditors, intertwined accounts, singleness of economics of units, among others. Once these proceedings were consolidated, a single Corporate Insolvency

[58] *Id* §§ 18(f), 36.
[59] *Supra* note 49.

Resolution Process (**"CIRP"**) was conducted showing intertwined workings and functions, and a common CoC for all 13 companies was made, while the resolutions plans were different. The NCLT divided the companies into two classes - the first category was the companies where the asset value was better than others and there was scope for liquidation. The second category was the companies where they would survive even if the resolution process is done separately for them. Thus, only the first category companies were consolidated.

Further, in the case of *Edelweiss Asset Reconstruction Company Ltd v. Sachet Infrastructure Pvt Ltd*,[60] the National Company Law Appellate Tribunal (**"NCLAT"**) faced the question of whether loans taken under the guarantee of a common "Corporate Guarantor" can be clubbed together for a fair process. The NCLAT held that Corporate Debtors and Corporate Guarantors in the given transaction were common or co-borrowers and any resolution plan passed by Resolution Professionals individually would not be fair and just. It was also held that having a common resolution professional will lead to common proceedings and plan against the corporate debtor which would benefit the stakeholders of the company, especially the creditors.[61]

The NCLAT also laid down a test to determine whether a group insolvency process can be initiated or not and stated that the plea of grouping must be supported with evidence of an interlinked and interdependent nature of transactions, which cannot be looked at in isolation. Therefore, in the aforementioned case, out of the 9 companies that were requested to be

[60] Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd. &OR's, CA(AT) (Insolvency) Nos. 377 to 385 (2019).
[61] *Id.*

clubbed, only five were clubbed together. The case of *Bikram Chatterji v. Union of India*[62] also saw the Supreme Court initiating the insolvency proceedings against the whole Amrapali Group and attaching all the properties of the 40 companies and freezing bank accounts of all directors.

The NCLT in its most recent judgement in *Axis Bank Limited v. Lavasa Corporation Limited*,[63] looked at various control factors and observed that there was an element of common control. The subsidiary companies against whom insolvency proceedings were initiated were wholly-owned subsidiaries of the Lavasa Corporation Ltd., with common directorship, assets, and liabilities. Thus, the NCLT observed that for group proceedings, there must be a substantial interdependence in the activities of the groups and an element of inter-lacing of substantial finance where the entities were acting as guarantors for loans of the others. Further, the companies pooled their resources, coexisted, and acted in consonance and had a common brand name "Lavasa" which made it very difficult for creditors to differentiate between the different entities. Considering the commonalities between the four entities and the intertwined transactions, the NCLT held that the insolvency procedure of the parent company affects the insolvency process of the subsidiary company, as both are financially dependent on each other. Thus, the Tribunal in this case had consolidated the insolvencies of the Lavasa group for the overall benefit of the creditors and stakeholders.

Such judicial pronouncements by the NCLT have tried to move the Indian companies towards group insolvency procedures. However, the lack of

[62] Bikram Chatterji v. Union of India, W.P. (Civil) No(s).940/2017 (2018).
[63] Axis Bank Limited and others v. Lavasa Corporation Limited, MA 3664/2019 in C.P.(IB)-1765, 1757 & 574/MB/2018 (2020).

concrete laws creates chaos. Thus, a Working Group was constituted by the IBBI on January 17, 2019 to recommend a framework for the collective insolvency resolution as well as the liquidation of group companies. There have been insightful recommendations made by the Report of the Working Group. Firstly, it recommended that the definition of "corporate group" should include holding, subsidiary and associate companies, as per the ownership and control aspects.[64] Secondly, the Working Group proposed to include a provision allowing the financial and operational creditors of various organisations or a group to file a joint application to initiate the CIRP against them under Section 7, 8 and 9 of the IBC.[65] This will not only save expenses of filing separate applications but also save the time of the courts/ tribunals to deal with each case separately. In furtherance, the Working Group suggested that a single AA should take up the whole insolvency process of the group company.[66] However, the Report also specifies that multiple AAs or insolvency professionals can also be involved in cases where the issues are regarding the conflict of interest, lack of resources or a negative impact on any stakeholder. This process can be made effective only when there is proper communication and coordination among parties involved in the whole process.

V. CONCLUSION

We have seen how large groups of companies are involved in insolvency proceedings and separate cases are filed against each of the organisations under such a group. This makes the whole resolution process unnecessarily long and delays the proceedings. The stakeholders, especially

[64] *Supra* note 6, at ¶ 26.
[65] *Supra* note 6, at ¶ ¶ 37, 42.
[66] *Supra* note 6, at ¶ 37.

the creditors, suffer a lot due to this delay. Here, consolidation of such proceedings helps in timely remedy.

India has adopted IBC to govern the insolvency process but the legislation lacks provisions for group insolvencies. Although the NCLT and Supreme Court have tried to make judicial interpretations in various cases and introduce the concept of group insolvency in India, the need to have a legal framework in this regard is undeniable. The UNCITRAL Model Law on Group Insolvency can be taken as a reference and can be adopted into the domestic law keeping in mind the Indian market and companies.

Various jurisdictions have established provisions and procedures for carrying out group insolvencies and the same can be taken into consideration while formulating a proper procedure in India. Extension of liabilities, collaboration and unity of insolvency practitioners, judicial authority, joint books of accounts, a joint application for initiation of the process, and provisions regarding clubbing of claims on a later date must be some aspects that should be taken into consideration. Though extension of liability of insolvency matters of a subsidiary company to the holding company is beneficial to the creditors and the stakeholders, the same is a serious breach of the principle of separate legal entity and lifting of the corporate veil, specifically when there is no breach of law or malafide intention of the corporate debtor. However, as discussed earlier, the provisions for group IRPs need to be introduced as an exception to the principle of separate legal entity and lifting of the corporate veil, in order to bring an end to the chaos and confusion created by multiple CIRPs of the same group before different AAs as observed in the Amtek Auto Case.

Further, the structure of companies, especially conglomerates is very different and diversified in India. Certain conglomerates in India due to the diverse business outreaches have little to no decision-making power with respect to other related companies, which also includes having a separate board of directors. However, in jurisdictions like Australia and the United Kingdom, the parent company has substantial control in the subsidiary company, with unified management and assets and generally an intertwined relationship. Therefore, introducing an absolute provision of holding a parent company responsible for the breach of the subsidiary company, without any malafide intention or breach of law, would be a slippery slope and play against the purpose causing more damage than good.

It is also imperative to note that in India the group companies are generally promoter groups[67] and laws should be made accordingly. The Working Group Report has tried to bring in recommendations considering the laws in different jurisdictions but the Indian market has seen conglomerates with a base of promotor groups and thus, those ideas from other countries might not be as feasible for us. Considering the diverse structure of the corporate entities in India, we as a jurisdiction can start with bringing in administrative and procedural changes like filling common applications and establishing common CoCs until a proper legislative framework has not been formulated. The IBBI and the NCLT must encourage companies and the creditors to initiate consolidated proceedings and undertake proactive measures for ensuring the same.

[67] India Bankruptcies Status Report: NCLT Sanctioned Plans, DEBTWIRE SPECIAL REPORT (Oct. 18, 2018).

Additionally, the legislation must include separate characterisation and tests for the IRPs that can be consolidated and those that cannot. This differentiation is extremely crucial as not all companies of a group may be involved together, either operationally or financially, and the consolidation of the same would impact the creditors negatively. The legislation for group insolvencies must be drafted with due care so as to ease the whole process and not open the floodgates for litigation or make the process more cumbersome than it is.