HARMONISING GROUP INSOLVENCY IN INDIA: ANALYSING THE ROBUSTNESS OF INDIVIDUAL CHOICE

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The Insolvency and Bankruptcy Code, 2016 has brought significant reforms in the preservation of asset value, thereby contributing to the economic fortification of India. However, the existing restructuring framework in the country offers a comprehensive strategy primarily focused on individual entities, overlooking the intricacies associated with group companies. While the principle of 'separate legal entity' remains steadfast in India, there have been occasions where businesses find themselves accountable for the financial obligations of their affiliated companies. With the exponential upsurge in inter-connected entities, it becomes imperative for India to have a holistic mechanism for group insolvencies. In 2019, the Insolvency and Bankruptcy Board of India constituted a Working Group on Group Insolvency ('WG'). Based on WG recommendations, the Ministry of Corporate Affairs in 2021, constituted the Cross Border Insolvency Regulations Committee ('CBIRC-II'), which propagated the framework of group insolvency that can be adopted. However, the panel was not in favour of adopting UNCITRAL Model law on Enterprise Group Insolvency ('MLEGI'). The paper deals with the perks and pitfalls of the CBIRC-II framework. The authors through their analysis, aim to indulge in the possibility of 'individual choice', offered to companies during group insolvency. The argument of extension of liability is advocated in order to protect corporates from unwarranted outcomes. The paper concludes by highlighting the need for having group insolvency provisions modelled after MLEGI, along with the comparative analysis of provisions in different countries.

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I. INTRODUCTION

The financial services sector worth approximately Rs. 177 lakh crore, holds the livelihood of the Indian economy.[1] To garner more profit and expertise, the current economic stint has given rise to connected companies which display interlinkage with respect to finance or operation. Deterioration of connected companies, resulting in the default of one or more companies, culminates in instances of 'group insolvency'.[2] In a recent conference, RBI Governor Mr Shaktikanta Das envisaged a group insolvency mechanism, through legislative changes to address both domestic and cross-border insolvencies, to increase the efficacy of Corporate Insolvency Resolution Process ('CIRP').[3] Moreover, the Ministry of Corporate Affairs ('MCA') released a discussion paper,[4] in suggested mechanisms to streamline the insolvency process in interdependent distressed companies. As the Insolvency and Bankruptcy Code ('IBC') is silent on the CIRP of interdependent entities, MCA proposed a consolidated mechanism. A consolidated mechanism of resolution for interdependent entities would allow maximum utilisation of existing resources, attempting to retrieve many companies through one CIRP. In light of such instances MCA noted that here might be a common Adjudicating Authority and Insolvency Professional for the Corporate Debtor and its related parties. The common resources would allow

[1] Department of Economic Affairs, *The Economic Survey 2022-2023* (January 2023) 21.

[2] Dave Grey, *The Connected Company* (Thompson Reuters 2018) 128.

[3] Shaktikanta Das, Governor of the Reserve Bank of India 'Insolvency and Bankruptcy Code – Towards Achieving Full Potential' (Speech at the conference on Resolution of Stressed Assets and IBC – Future Road Map, organised by the Centre for Advanced Financial Research and Learning (CAFRAL), Mumbai, 11 January 2024) <https://www.bis.org/review/r240117f.htm> accessed 18 July 2024.

[4] IBC Laws, 'Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016 – MCA Notice dated 18.01.2023' (Ministry of Corporate Affairs 2024) <https://www.mca.gov.in/content/dam/mca/pdf/IBC-2016-20230118.pdf> accessed 18 July 2024.

speedy resolution alongside easier management for multiple companies. In a nutshell, the discussion paper suggests a detailed framework for domestic group insolvencies and follows the ethos of Report of the Cross Border Insolvency Rules/Regulations Committee-II ('CBIRC-II').[5]

As the Indian regime continues to be on an undecided cliffhanger, international law has been constantly developing. In July 2019, the United Nations Commission on International Trade Law ('UNCITRAL') adopted the Model Law on Enterprise Group Insolvency ('MLEGI'), which aims to address the issues relating to the co-ordinating multiple insolvency proceedings. The MLEGI aims to develop procedures for handling group insolvency cases and provides relief necessary for effectively coordinating insolvency within enterprise groups. Before adopting MLEGI, UNCITRAL also adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments ('MLIJ'). It aims to provide a streamlined and standardised process for recognising and enforcing insolvency-related judgments, especially for foreign insolvency proceedings.

Keeping in mind the international diaspora, the absence of a group insolvency legislation, deters the country's economic development and foreign investment. The paper encapsulates the opportunities and roadblocks that are present in India to allow a successful adoption of a group insolvency framework. The paper analyses the WG on Group Insolvency Report ('WG report'), to test the viability of individual choice as proposed by the Committee. Moreover, a cross-jurisdictional analysis is presented to explore the possibility of an international group insolvency framework for India. The paper concludes by suggesting a need for an appropriate enterprise insolvency framework, aiming to make India an economic paradise for foreign and domestic investors.

II. GROUP INSOLVENCY REGIME IN INDIA

Indian group insolvency regime is majorly based on judicial interpretation and intervention. IBC does not provide any provision that allows the consolidation of insolvency proceedings of separate entities. To cater to the growing wave of group companies, the WG was established by the Insolvency and Bankruptcy

[5] Cross Border Insolvency Rules/Regulation Committee, *Report of CBIRC-II on Group Insolvency* (December 2021) 59 <https://ibbi.gov.in/uploads/resources/9ff4f639c0d2a29ea188fd0cba332273.pdf> accessed 18 July 2024.

Board of India ('IBBI') under the leadership of Shri U.K. Sinha.[6] The WG was constituted with the objective of laying down a regulatory framework for the adoption of a framework similar to the MLEGI.

The WG addressed important issues relating to identifying a group, the extent of grouping, and the mechanics involved. It primarily considered three elements: *procedural coordination mechanisms, substantive consolidation mechanisms,* and *rules for the perverse behaviour of companies* in a corporate group.[7] The WG report discusses the gaps in the Indian regime that prevent a successful adoption of Group Insolvency in the country. This section explores the different pathways and numerous opportunities described in the WG report, emphasizing the strategic options and potential advantages identified.

The definition of 'corporate group' is defined '*to include holding, subsidiary and associate companies*'.[8] However, the WG report considers the existence of a conglomerate undergoing insolvency proceedings, and yet keeps the possibility of not all companies being affected by the proceedings open. One of the suggestions propagated by the WG is the inclusion of un-affected companies in group insolvency proceedings. The WG recommended that the Adjudicating Authority can be requested to include businesses that are inextricably linked but do not meet the criteria for a 'corporate group' to maximise the bankrupt company's worth without compromising the value of the company's assets that are being included.[9]

The WG focuses on 'procedural coordination'. It limits the developing scope of the insolvency regime to procedural instead of substantive issues. It recommends co-operation, co-ordination, and information-sharing as the mandatory components of the enterprise insolvency framework. Courts have been following the three principles as a standard practice. The Principal Bench of the National Company Law Tribunal ('NCLT') issued a landmark ruling in *Venugopal Dhoot v State Bank of India*,[10] ordering that the insolvency

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[6] Ministry of Corporate Affairs, *Report of Insolvency Law Committee on the Cross Broder Insolvency* (October 2018) 24 <https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf> accessed 18 July 2024.

[7] Report of CBIRC-II on Group Insolvency (n 5).

[8] Working Group on Group Insolvency, *Report of the Working Group on Group Insolvency* (2019) 28 <https://ibbi.gov.in/uploads/whatsnew/2019-10-12-004043-ep0vq-d2b41342411e65d9558a8c0d8bb6c666.pdf> accessed 18 July 2024.

[9] Report of Insolvency Law Committee on the Cross Broder Insolvency (n 6) 29.

[10] *Venugopal Dhoot v State Bank of India* (2018) SCC OnLine NCLT 29551.

proceedings for all of the Videocon group's group companies be heard by the same adjudicating authority in order to avoid any potential conflicts of rulings.[11] Similarly, in *Edelweiss Asset Reconstruction Company Limited v Sachet Infrastructure Pvt Ltd*, simultaneous CIRPs were initiated under a single resolution professional.[12] The consolidation was based on the prospect of common assets in a town planning scheme.

The recommendation of procedural consolidation not only saves time of the Adjudicating Authorities but also makes the process easier to manage. To prevent mismanagement and the tactic of forum shopping being followed by companies, a joint application would put these practices to bed. Further, in the case of the subsidiaries being situated in different parts of the country, it would be easier to ascertain the Centre of Main Interests ('COMI').[13] The COMI of a company is determined by the place where the company conducts its principal affairs. The determination of principal affairs of a conglomerate can be discovered through its consumer base, head office address, and/or the controlling centre for all the related entities. Having a single place for adjudication and resolution would be made easier with the appropriate attribution to COMI.

Adoption of group insolvency would be beneficial not only for the bankruptcy regime but also for the ease in disclosure norms being practiced in the country. Disclosure regulations mandate companies to inform any substantial change in their company structure.[14] Multiple companies undergoing insolvency is a substantial change in company structure.[15] The same is required to be informed to the public at its earliest. Considering the grave ramifications, it would be beneficial for conglomerates to share information about insolvency. The public would gain confidence about subsidiaries being supported by parent companies and vice versa.[16] The strict disclosure norms and the mandate of

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[11] ibid.

[12] *Edelweiss Asset Reconstruction Company Limited v Sachet Infrastructure Pvt. Ltd.* 2019 SCC OnLine NCLAT 592.

[13] Report of Insolvency Law Committee on the Cross Broder Insolvency (n 6) 60.

[14] Ranjith Krishnan and Usha Ganapathy Subramanian, 'How Sebi's norms for enhanced disclosures promote better governance' (*The Mint*, 5 July 2023) <https://www.livemint.com/money/personal-finance/sebi-introduces-newamendments-to-listing-regulations-for-better-corporate-governance-andtransparency-in-india-11688497626326.html> accessed 18 July 2024.

[15] SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, regulation 30.

[16] Ronald J. Balvers, John F. Gaski and Bill McDonald, 'Financial Disclosure and Customer Satisfaction: Do Companies Talking the Talk Actually Walk the Walk?' (2016) 139(1) Journal of

information sharing can both be tackled efficiently, through the group insolvency regime.[17]

Substantive consolidation of proceedings has been duly considered by the WG report. It realises the benefits like lower costs of the insolvency process, maximisation in the value of estates collectively for the satisfaction of creditors and stakeholders, and acting as a check against fraudulent acts.[18] India has experienced a case of substantive consolidation in *State Bank of India v Videocon Industries Ltd. & Ors.*[19] The court upheld the subsidiaries of Videocon to be considered as a single entity. The court moved past the separate legal entity doctrine to recognize the enterprise's identity.[20] The foundational focus of the courts has been on 'equitable treatment to creditors.'[21] Adopting substantive consolidation of insolvency proceedings is accepted to be a complex task that needs reconsideration of the established principles of company law. The WG report relies upon foreign jurisdictions to discuss the prospective adoption of substantive consolidation and also recommends revamping Indian laws to allow the same.

The WG report lays down the foundation of group insolvency in India. The salient features propagated through the WG report put forth the holistic development of a policy in India. The procedural and substantive consolidation through a legislative amendment would provide India with a streamlined and uniform procedure for domestic and international enterprise insolvencies.

III. LEGISLATIVE AMENDMENTS

Chapter Z, part of the proposed reforms under the IBC, addresses the complexities of group insolvency in India. It aims to establish a coordinated process for insolvency proceedings involving multiple group companies while preserving the separate legal identities of each entity. This chapter introduces

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Business Ethics 29, 32 <https://ideas.repec.org/a/kap/jbuset/v139y2016i1d10.1007_s10551-015-2612-6.html> accessed 18 July 2024.

[17] Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP 2009) 154.

[18] Ilya Kokorin, 'The Rise of "Group Solution" in Insolvency Law and Bank Resolution' (2021) 22 European Business Organization Law Review 781, 798 <https://www.researchgate.net/publication/353557505_The_Rise_of_'Group_Solution'_in_Insolvency_Law_and_Bank_Resolution> accessed 18 July 2024.

[19] *State Bank of India v Videocon Industries Ltd.* 2018 SCC OnLine NCLT 13182.

[20] Ilya Kokorin (n 18).

[21] Ilya Kokorin (n 18).

several key mechanisms to improve the efficiency and transparency of group insolvency resolutions.

One major provision would permit group companies to file joint insolvency applications, streamlining a process that, under current law, requires separate filings for each entity.[22] Additionally, Chapter Z proposes appointing a single RP to oversee the proceedings of all related entities, ensuring a more consistent approach to resolution, as opposed to the current framework under Section 16(1).[23]

Another significant provision would allow the pooling of assets and liabilities across group companies, facilitating a collective resolution.[24] While this would enhance creditor transparency and fairness, it may raise concerns about the protection of creditors of more solvent entities, who could face potential disadvantages if assets are pooled with those of distressed companies. Chapter Z is also expected to address cross-border insolvency challenges by incorporating principles from the UNCITRAL Model Law on Cross-Border Insolvency. Currently, Sections 234 and 235 of the IBC do not provide adequate mechanisms to manage group insolvency across jurisdictions, and Chapter Z would rectify this through enhanced procedural coordination.[25]

Overall, Chapter Z represents a critical advancement in India's insolvency framework by promoting joint applications, pooling of resources, and addressing cross-border complexities, which will streamline group insolvency resolutions while balancing stakeholder interests.

IV. CHALLENGES IN IMPLEMENTATION

The foundation laid down by the WG report is not without flaws. The jurisprudence of a substantial and procedural consolidation provides a theoretical framework of group insolvency, whereas it fails to recognise the challenges that prevent the practical implementation of the same. Among identifying other challenges, the authors attempt to decrypt is the option of 'individual choice' provided to companies in cases of enterprise insolvency.

[22] Insolvency and Bankruptcy Code 2016, ss 7–9.
[23] Insolvency and Bankruptcy Code 2016, s 16.
[24] Report of the Working Group on Group Insolvency (n 8).
[25] Insolvency and Bankruptcy Code 2016, ss 234–235.

The case of *Giriraj Enterprises* opened the floodgates of challenges faced by Indian courts, when faced with group insolvency applications.[26] The NCLT denied the consolidation of holding and subsidiary companies, in the absence of equity jurisdiction and specific provisions under the IBC allowing consolidation or simultaneous running of insolvency proceedings.[27] The NCLAT, in an order dated 31 August 2023, reversed the challenged decision of the NCLT and directed the consolidation of proceedings, citing maximisation of the value of assets and value addition as the primary objects of IBC.[28] As the matter remains pending before the Supreme Court, questions regarding the adoption of group insolvency have resurfaced in the Indian jurisprudence.

First, the definition of 'corporate group', as defined by the WG, is restrictive and narrow in approach. It fails to address the possibility of inter-connected companies without being sister companies. Second, the determination of COMI is left at a lurch in the WG report. The absence of a mechanism to determine COMI leaves the possibility of multiple applications in multiple States, making the process tedious and haphazard.[29] In such a scenario, adopting an enterprise insolvency approach would make it difficult for the companies to choose a single adjudicating authority. With the advent of globalisation, it becomes necessary for the country to recognise and adopt appropriate cross-border regimes. Amidst the vagueness of the WG report, the main issue lies in the provision of 'individual choice' provided by the Committee. By portraying these challenges, the WG report becomes a hindrance in developing enterprise insolvency instead of strengthening the approach.

V. INDIVIDUAL CHOICE: A DISTORTED MOVE FOR INDIAN INSOLVENCY

One of the major setbacks of the WG report is the discretion provided to the companies to apply for joint or separate insolvencies. Allowing both joint and separate applications creates a hassle in the coordinated and combined listing

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[26] *Giriraj Enterprises v Regen Powertech Private Limited and Ors*, Company Appeal No 323 of 2021 (National Company Law Appellate Tribunal, 21 August 2023).

[27] Vikash Kumar Jha and Shivansh Vishwakarma, 'High Time for Group Insolvency Framework?!' (*Dispute Resolution Blog*, 27 November 2023) <https://disputeresolution.cyrilamarchandblogs.com/2023/11/high-time-for-group-insolvency-framework/> accessed 18 July 2024.

[28] ibid.

[29] ibid.

processing.[30] For example, in a conglomerate with 12 subsidiaries under insolvency, if only 5 file a joint application, while the rest 7 go for separate filing, the entire purpose of enterprise insolvency is defeated. The possibility of simultaneous applications for the same enterprise results in an absurd situation. Looking at the difficulty in consolidation of proceedings for conglomerates, the Ministry of Finance created a Bankruptcy Law Reforms Committee ('BLRC') in 2014. The BLRC was tasked with creating a new bankruptcy law that would provide a unified framework for addressing the insolvency of both individuals and legal entities. This comprehensive reform aimed to overhaul the insolvency resolution process for all entrepreneurs in India.[31] The intention of the BLRC, to prevent parallel proceedings and to uphold the sanctity of insolvency proceedings, shall be defeated by allowing both separate and joint applications for a conglomerate insolvency.[32]

The concept of individual choice stems from India's adherence to the 'doctrine of the corporate veil'.[33] Upholding each company as a separate legal entity alongside restructuring several companies through the same process becomes a difficult bridge to cross through the principles of Indian company law. Allowing the companies to opt out of group insolvency by filing a separate application, is in consonance with the restrictive lifting the corporate veil as established in *Life Insurance Corporation Limited v Escorts Ltd.*[34] Statutory lifting of the corporate veil in cases of fraud, tax evasion, etc. would be fruitful in substantive consolidation of proceedings but would fall short, in cases of procedural consolidation.[35] Determination of the entire conglomerate as a single entity, based on a case-to-case determination would make the process of lifting of corporate veil discretionary, leaving room for arbitrary action.[36]

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[30] Invitation of comments on IBC 2016 (n 4) 33.

[31] Bankruptcy Law Reforms Committee, *Bankruptcy Law Committee Report* (November 2015) vol 1.

[32] ibid.

[33] Pilar Spotorno, 'Vedanta and Okpabi: A Step Forward in Corporate Group Accountability?' (2024) 45/1 Business Law Review 5 <https://www.researchgate.net/publication/378145385_Vedanta_and_Okpabi_A_Step_Forward_in_Corporate_Group_Accountability> accessed 18 July 2024.

[34] *Life Insurance Corporation Limited v Escorts Ltd.* AIR 1986 SC 1370.

[35] Vinod Kothari and Shikha Bansal, 'Entity Versus Enterprise: Dealing with Insolvency of Corporate Groups' (2019) SSRN Papers <https://ssrn.com/abstract=3350877> accessed 18 July 2024.

[36] UNCITRAL Model Law for Cross Border Insolvency (1997).

Further, in the case of *Walnut Packaging Private Limited v The Sirpur Paper Mills Ltd.*,[37] the Andhra Pradesh High Court, allowed the holding company to pay the debts of a subsidiary company, since the transactions of the companies were intertwined, and the corporate veil could be lifted in order to ensure the functioning of the company. The current WG report discusses the prospects of procedural co-ordination to develop the principles of enterprise insolvency. To shift towards an era of substantive consolidation, without banking upon the prospect of individual choice, the reasons for lifting the corporate veil need to be enlarged and specified.[38]

Allowing individual choice becomes an even bigger problem when dealing with cross-border group insolvencies. Companies with interdependent transactions, undergoing separate insolvency proceedings, make the process burdensome.[39] An enterprise having multiple resolution plans within the Indian sub-continent would make it difficult for other countries to recognise the judgement. Creditors situated abroad might be disadvantageously placed in a separate application but would be benefitted from the joint application.[40] Thus, the provision opens the floodgates of forum shopping at an international level, creating havoc for the principles of bankruptcy resolution.

The proceedings against Infrastructure Leasing & Financial Services Limited ('IL&FS') and its associated companies, operated through a complicated structure of business divisions that did not fit neatly into the usual parent-subsidiary model. Out of 302 group companies, only 4 main companies were referred to insolvency.[41] The outstanding debt of Rs. 91,000 crores, was merely resolved to Rs. 7,000 crores.[42] A large number of subsidiaries, failed to be a part of the resolution, making the revival and sustenance of the IL&FS group a menace. The procedural consolidation did assist the NCLT in managing the assets of the company, however, the lack of consolidation and complete participation, reeked of the challenges portrayed by individual choice in enterprise insolvency.

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[37] ibid.

[38] Vinod Kothari and Shikha Bansal (n 36).

[39] UNCITRAL Legislative Guide on Insolvency Law, Part Three (2010).

[40] Risham Garg, 'Issues in Insolvency of Enterprise Groups', 6(1) Journal of National Law University Delhi 50.

[41] *Union of India v Infrastructure Leasing & Financial Services Limited & Ors*, Company Appeal No. 346 of 2018 (National Company Law Appellate Tribunal, 13 May 2022).

[42] ibid.

The 'group solution' will undeniably reduce the time, costs, and effort required to identify and understand the dynamics of related party transactions, claims, counter-claims, and information pertaining to common investments. This approach will not only benefit the investors and stakeholders with respect to the division of funds and resources but also fulfil the objectives enshrined in the Preamble of the Code.[43]

The case of *Qintex Australia Finance Ltd v Schroders Australia Ltd*, realised the problem of subsidiaries wanting to disassociate themselves from conglomerate issues, in order to gain more profits.[44] The bustle of commercial life prevents subsidiary companies from assisting enterprise insolvency even in situations of inter-connected transactions. This leads to an increase in the perverse behaviour of companies during group insolvency.[45] The proposition also goes against the international principle of a common resolution professional and committee for insolvency.[46] The case highlights the challenges faced by subsidiary companies, which eventually leads them to disassociate themselves from the process of group insolvency. Owing to the loss-laden financial transactions of the parent company, subsidiaries are hesitant to pierce the corporate veil.[47] In order to propagate the 'group solution' efficiently, subsidiaries need to be incentivized to continue to be a part of group CIRPs.

Lastly, the provision of individual choice also puts Article 20 of MLEGI in jeopardy.[48] A group insolvency planning would be futile if one company separately proceeds against the debtor.[49] The enforcement of a common moratorium against the entire conglomerate would make it difficult for the separate company to continue its proceedings in a hurdle-free manner.[50] The existence of reliefs like a moratorium, to stay all the pending proceedings against the enterprise and the holding-back of common assets would be of no value in

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[43] Anoop Rawat and Ankham Khan, 'Issues and challenges of group insolvency in India' (*Asia Business Law Journal*, 24 January 2022) <https://law.asia/issues-challenges-india-group-insolvency/> accessed 18 July 2024.

[44] *Qintex Australia Finance Ltd v Schroders Australia Ltd* (1990) 3 ACSR 267 (Australia).

[45] Georg Streit and Fabian Bürk, 'Section 269c' in *Insolvency and Restructuring in Germany – Yearbook,* (Thompson Reuters 2019) 77.

[46] ibid.

[47] Quintex Australia Finance Ltd (n 44).

[48] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2013) 98.

[49] UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment 2019, art 20.

[50] Life Insurance Corporation Limited (n 34).

case of simultaneous joint and single applications. Thus, the opportunity of a discretionary application shall be removed or structured. Laying down guidelines for acceptance of separate and/or joint applications might make the process a bit more streamlined.

The challenges signify that the road to adopting group insolvency is not without hurdles. A domestic adoption would not be sufficient to deal with the growing upsurge of cross-border group companies. India not only needs an efficient domestic group insolvency framework but should look forth to adopting a working model for cross-border enterprise insolvencies. The authors discuss certain successful international models of group insolvency, that would assist India in devising a functioning archetype for India.

VI. INTERNATIONAL PERSPECTIVE

Countries across the world have their own arrangements and rules to deal with the different dimensions of insolvency, namely, insolvency of a corporation on a standalone basis group insolvency of a business group or cross-border insolvencies. Although a couple of nations have provisions well set up in place in their respective statute to deal with group insolvency, many other countries have adopted MLEGI or European Union ('EU') Regulations. Each of these jurisdictions has dealt with 'individual choice' in a unique manner. This section aims to understand enterprise insolvency along with its characteristics as adopted in multiple jurisdictions abroad.

A. Applicability of MLEGI

The UNCITRAL Legislative Guide 2010 distinguishes two types of insolvency regulation applicable to corporate groups: (1) the separate entity approach (by far the most prevalent) and (2) the single enterprise approach.[51] Mevorach refers to them as 'entity law' and 'enterprise law' respectively. As noted above, the separate entity approach relies on the principle of legal separability.[52] Thus, insolvency estates and pools of creditors of legal entities are separated. This should limit the risks attached to the failure of a single company. However, the economic interconnectedness of companies in a group could make such an approach less appealing. In contrast, the single enterprise approach treats the group as a single economic unit that operates to further the interests of the group

[51] UNCITRAL Legislative Guide on Insolvency Law (n 40) ch I, para 31.

[52] Irit Mevorach, 'Transaction Avoidance in Bankruptcy of Corporate Groups' (2011) 8(2) ECFR 243–244.

as a whole. This latter approach has given rise to various rules and techniques, from less intrusive (e.g. communication and cooperation between insolvent group members) to the ultimate disregard of entity boundaries (substantive consolidation).[53]

The UNCITRAL adopted the MLEGI in July 2019, which tends to address the matter pertaining to the coordination of multiple insolvency proceedings, taking into account the development of procedures pertaining to group insolvency and providing for relief requisite for coordinating an enterprise group insolvency. Nations all over the world are allowed to establish it either in full or in part (with or without modifications) with the help of the enacting insolvency legislation in the respective country. Thus, individual choice in each of the jurisdictions becomes a separate nation that has adopted MLEGI might be approached by courts or office-holders in non-adopting States across the globe for seeking recognition and assistance as MLEGI does not insist on reciprocity.

B. European Union

The European Courts mostly refer to Regulation 2015/848 of the European Parliament, also known as the Recast European Insolvency Regulation ('EIR'). It is pertinent to note that this regulation models itself similarly to MLEGI, and facilitates international cross-border insolvencies.[54] In the direction of improving the efficacy of administering group insolvency proceedings, Recast EIR has introduced procedural rules on the coordination of group insolvency proceedings. This mechanism enshrines the status of a legal superstructure to a group entity and also ensures that the separate legal personality of every enterprise in the group remains intact. It is pertinent to note that the idea behind this mechanism, stems from the ethos of planning proceedings under the Model Law 2019. The entities in a group, have autonomy to disregard the suggestions of the coordinator however, they do not have an individual choice to opt out of the coordinated proceedings.

C. United States

On the other hand, in the United States, the Bankruptcy Courts generally refer to Section 105(a) of the US Bankruptcy Code, which authorises to '*issue any order, process, or judgement that is necessary or appropriate to carry out the*

[53] UNCITRAL Legislative Guide on Insolvency Law (n 40) ch II, para 105.
[54] ibid 15.

provisions."[55] This provision, when read with the Doctrine of Substance Consolidation, carves the methodology for group insolvency proceedings which even gives a choice to have individual proceedings.

The case, *In Re Auto Trian Corp* sets out the foundations of the factors of Substantive Consolidation, the prima facie case must demonstrate (i) that 'there is substantial identity between the entities to be consolidated,' and (ii) that consolidation is necessary to avoid some harm or to realise some benefit.[56] Once the proponent for consolidation has fulfilled, the burden shifts to an objecting creditor to show that, firstly it has complied with the separate credit of one of the entities to be consolidated, and secondly, whether it will be prejudiced by substantive consolidation. In *Eastgroup Properties v Southern Motel Assoc., Ltd.*,[57] the Eleventh Circuit adopted a modified version of the standard put forth by *In Re Auto-Train Corp., Inc.*[58] The court held that the proponent of consolidation must demonstrate that: (i) 'there is substantial identity between the entities to be consolidated', and (ii) 'consolidation is necessary to avoid some harm or to realise some benefit.' The cases have also set standards for setting the burden of proof while having substantive consolidation. These standards impart choice of objecting creditor, who has to show (i) reliance on the separate credit of one of the consolidating entities, and (ii) instances of prejudice faced by substantive consolidation.

D. UNITED KINGDOM

The Insolvency Act of 1986 governs insolvency proceedings in the United Kingdom ('UK'). When it comes to the group insolvency, all assets and obligations of each member are recognised as a separate legal person. However, it is customary to designate the same administrator or liquidator for a number of enterprises within a Group, which entails some procedural cooperation. There is no requirement or duty for a company's affiliate to proceed under the same kind or location of insolvency proceedings as other Group members because each Group Company has a separate legal entity. [59]

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[55] 11 USC § 105(a).

[56] *Drabkin v Midland-Ross Corp. (In re Auto-Train Corp., Inc.)* 810 E2d 270 (DC Cir 1987) 276.

[57] *Eastgroup Properties v Southern Motel Assoc., Ltd* 935 F.2d 245 (11th Cir 1991).

[58] In re Auto-Train Corp., Inc. (n 57).

[59] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 796.

In a recent consultation, the UK government has confirmed the adoption the UNCITRAL MLEGI, becoming the first country to do so.[60] Since the UK's insolvency regime is highly valued, this development after separating from the EU, would further bolster the participation of the UK in global cooperation on insolvency matters thereby benefiting both the UK and its international partners.

The courts of England and Wales have taken a consistent approach to group insolvency cases, as governed by the Model Law on Cross-Border Insolvency and the European Insolvency Regulation. This approach involves identifying a common COMI within one jurisdiction, which allows multiple members of a group to be considered within the same jurisdiction. However, each group member is still treated as an individual entity, thereby giving autonomy to the parties. A recent example of this approach can be seen in the case of *Re Agrokor DD*, where the Court recognized Croatian group proceedings under the Cross-Border Insolvency Regulations 2006 ('CBIR') but limited the scope of recognition to only one of the group members, indicating that group proceedings as a whole fall outside the purview of the CBIR.[61] Thus, with the adoption of MLEGI, a new wave of insolvency seems to be born in the UK.

The discussion paper by MCA highlighted the procedural imbalances when separate CIRP occurs for each connected entity. This will result in not only duplication of efforts by stakeholders but also minimize the asset valuation of the entire group. Therefore, a mechanism to suddenly foster individual choice to modify or even opt-out out might put the entire proceedings in the doldrums.

The same situation was addressed in the case of *Re Collins and Aikman*, where debt restructuring was effectively coordinated (as per the Insolvency Act 1986 (as amended) and the Enterprise Act).[62] It is pertinent to note that if the administrators had not respected the creditors, and went with an individual proceeding, then approximately, 4300 people in Europe would have lost their

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[60] The Insolvency Service, *Implementation of two UNCITRAL Model Laws on Insolvency Consultation* (Consultation Outcome, 10 July 2023) <https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation>

[61] *In Re Agrokor DD*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018)

[62] *Re Collins & Aikman Corp. Group (Application for Administration Orders)* SA [2006] EWHC 1343.

jobs. Hence, emphasising more on individual choice can be detrimental to the stakeholders of the group company.

VII. SUGGESTIVE FRAMEWORK

A careful analysis of the development of cross-border group insolvency in India and abroad clearly signifies the need for legislation for the same. The multi-national companies around the world have suffered economically, thus having a singular platform of redressal makes their journey towards resolution easier. The country at this juncture does not lack the principles of group insolvency, rather it lacks in the uniformity of implementation and application. Through this section, the authors propose a streamlined suggestive framework through existing judicial principles of group insolvency.

The *State Bank of India v Videocon Industries Ltd.*, is an important development to decipher the enterprise approach towards group insolvency.[63] Application of insolvency was filed separately for 14 connected group companies. The court noticed that adjudicating each case separately would lead to the discrepancy, disagreements, and dis-association of the principles of the Insolvency law. The transfer of all the applications to the NCLT Mumbai Bench was based on the consensus amongst the counsels for all the parties.[64] The consolidation by a common order led to the lifting of the Corporate Veil without the establishment of a fraud.

The Adjudicating Authority attempted to resolve the tussle between a separate legal entity and a group enterprise, by enunciating 14 reasons that might allow consolidation of insolvency proceedings. The bench realized the following criteria for surpassing the separate legal entity doctrine without proving a sham. The guidelines were, '(a) common control (b) common directors (c) common assets (d) common liabilities (e) interdependence (f) interlacing of finance (g) pooling of resources (h) co-existence for survival (i) intricate link of subsidiaries (j) intertwined accounts (k) interlooping of debts (l) singleness of economic units (m) common financial creditors (n) common group of corporate debtors.'[65]

Additionally, the 'factor test' as adopted by the court in the Videocon case, leaves room for subsidiary companies to remain out of group insolvency

[63] *State Bank of India v. Videocon Industries Ltd.* 2018 SCC OnLine NCLT 13182.
[64] ibid.
[65] ibid.

aspects.[66] The bench held that 'if an entity is self-serving, self-dependent and self-sustainable, a view can be taken for not granting consolidation.'[67] , The Bench ordered the consolidation of 13 out of 15 entities into a single entity and left the remaining two, since they fell in the self-sufficient category.[68]

The Videocon case lays down the foundation of substantive consolidation in India. However, the proposition of 'individual choice', as presented in the WG report, creates roadblocks in implementation. Lessons shall be learnt from the MLEGI, to allow efficient development of enterprise insolvency law in India. The major attribution of the MLEGI is the involvement of a solvent company during the insolvency of related companies. The UNCITRAL Legislative Guide suggests that a solvent-related company should be a part of and assist its sister concerns to overcome the burden of restructuring by contributing its technological and ideation panel to manage the finances. The involvement of a solvent company would further add to the investor trust and assist in gaining better resolution plans.[69]

On a global level, there are different frameworks to address the group insolvency aspects, however, the cardinal principle that emerges from these mechanisms is to prevent the group disintegration, and to preserve the collective assets/valuation. There have been many instances, where a corporation has complex divisions, playing different roles. One company might deal in managing and owning important R&D work, licenses, real estate, etc., while another might be engaged in managing the finances and issuing stock, bonds, and debt instruments. One company can exercise managerial control, by administering the treasury and cash flows, while other companies may engage in the distribution and manufacturing of products. The aforementioned structure proves that when the insolvency process initiates, the working of one division has a significant impact on another division. Therefore, there is a need for a

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[66] Ritisha Gupta, 'SBI v. Videocon Case: Doctrine of Substantial Consolidation' (*SCC Online*, 9th January 2021) <https://www.scconline.com/blog/post/2021/01/09/sbi-v-videocon-case-doctrine-of-substantial-consolidation> accessed 18 July 2024.

[67] *State Bank of India v. Videocon Industries Ltd.* 2018 SCC OnLine NCLT 13182.

[68] Harshit Agarwal, 'Videocon Case: The Doctrine of Substantial Consolidation', (*India Corp Law*, 19 August 2019) <https://indiacorplaw.in/2019/08/videocon-case-doctrine-substantial-consolidation.html> accessed 18 July 2024.

[69] Matthew Pollak, John Rogula and Phil Maxwell, 'Three strategies to build and maintain investor trust' (*Ernst and Young*, 15 September 2021) <https://www.ey.com/en_in/consulting/three-strategies-to-build-and-maintain-investor-trust> accessed 18 July 2024.

'group solution', which will not only maximise the value of assets but also maintain the group-links for the vital resources of the company.[70]

The idealistic proposed legislation for India would be to adopt MLEGI while ensuring the principles of the Videocon case are upheld to keep up with the demographic requirements of India. Such a step would not only ensure global adherence and cooperation but would also indicate India's commitment to the unique legislative framework for group insolvency.

VIII. CONCLUSION

The group insolvency regime has become the need of the hour. For India to achieve its much-awaited stance as a global world power, it not only needs to invite foreign conglomerates but also provide them with a lucrative resolution and functioning plan. With the economic uncertainties prevailing around the world, the adoption of appropriate legislation for group insolvency becomes a step in the right direction.

The analysis of principles both in India and abroad, suggests that no new development of law is required at this juncture. However, it becomes necessary to streamline the process that exists and give the investors a clear-cut idea of what they will expect post their establishment in the country. Procedural consolidation of CIRPs will allow speedy resolution of conglomerates. Similarly, Doctrine of Substantive Consolidation would allow simpler resolution processes. The option of individual choice currently suggested by the Indian reports, adds havoc and confusion to the well-established principles of consolidation. The process allowing sister companies to stand out of group insolvency seems a bit haywire at the instance. Duplication of efforts and wastage of resources are two issues that individual choice introduces by allowing companies to proceed with CIRP in isolation.

A comparative analysis of various jurisdictions, presents India with an opportunity to revamp its laws and work towards a globalised insolvency regulation. Different jurisdictions approach group insolvency in varied ways, as seen in the European Union, the United States, and the United Kingdom. The EU's Recast EIR introduces a coordinated framework that balances structure with autonomy, allowing each group entity to maintain its separate legal identity

[70] Ilya Kokorin, 'The Rise of 'Group Solution' in Insolvency Law and Bank Resolution' (2021) 22, European Business Organization Law Review 781, 811.

while participating in a coordinated process.[71] In the United States, the insolvency system is more adaptable, utilizing Section 105(a) of the Bankruptcy Code and the Doctrine of Substantive Consolidation. This gives flexibility to pursue either individual or group insolvency proceedings, with a focus on fairness and creditor rights.[72] The United Kingdom adopts a more independent stance under the Insolvency Act of 1986, where each company is treated as a separate entity, though cooperation between companies within a group is encouraged, especially with the potential adoption of the MLEGI. These differing approaches highlight the balance between autonomy, coordination, and creditor protections, providing useful perspectives for jurisdictions like India as they refine their own group insolvency frameworks.

Thus, it becomes important for the Indian legislative framework to categorically lay down conditions that would trigger procedural consolidation, substantive consolidation and the exceptions that might allow individual choice to related entities. India is at the nascent stage of developing its insolvency regime, thus, by learning from abroad and upholding the principles laid down by the courts in landmark judgements, makes the dream of a successful enterprise insolvency half achieved.

[71] In re Auto-Train Corp., Inc. (n 57).
[72] 11 USC § 105(a).