Article

Issues in Insolvency of Enterprise Groups

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Abstract

Insolvency of enterprise groups has long remained an enigmatic and untouched issue in the realm of international insolvency law. Recently, the Working Group V of United Nations Commission on International Trade Law (UNCITRAL WG V) has taken up the onerous task to fill this void and to draft an instrument/model law to govern international aspects of insolvency resolution of enterprise groups (two or more enterprises that are interconnected by control or significant ownership)[2] including obligations of directors of enterprise group companies for acts done in the 'twilight zone'. This article attempts to introduce and outline certain key issues relating to insolvency resolution of enterprise group companies and discuss a few of them, reserving a comprehensive discussion shared in subsequent papers.

Keywords

Insolvency and Bankruptcy Code, 2016, enterprise groups, MNCs

Insolvencies of Transnational Enterprise Groups

An enterprise group has been loosely defined in Part III of the UNCITRAL Legislative Guide on Insolvency[3] as '*two or more enterprises that are interconnected by control or significant ownership*'. The interdependence of group members across jurisdictions, especially financial interdependence, attracts provisions of the cross-border insolvency law framework. The key dilemma with

[2] U.N. Comm'n on Int'l Trade Law, UNCITRAL's Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency 2, U.N. Sales No. E.12.V.16 (2012), https://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf

[3] *Id.*

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group insolvency is whether to give effect to the economic reality of integrated business operating through separate entities thus referring to the corporate entity as a whole or to strictly adhere to the corporate form and address each group member separately. In transnational insolvency, that dilemma is intertwined with indeterminacy concerning universalism or territorialism as the proper approach for cross-border insolvency.

The conduct of transnational insolvency proceedings concerning enterprise groups will often require assets of the different insolvency estates to continue to be used, realized or disposed of in the course of the proceedings.[4] The UNCITRAL Legislative Guide on Insolvency Law also lays down a list of issues to be considered while devising the framework for cross-border coordination. These issues include: identification of the location of the various assets and of the jurisdiction to which they are subject; determination of the law governing the assets and the parties responsible for determining how they can be used or disposed of; the extent to which responsibility for those assets can be shared among or allocated to different parties in different States; how information concerning the affairs of different debtors in different jurisdictions can be obtained and shared to ensure coordination and cooperation; and the sequence in which proceedings should evolve.[5] We will now discuss the location and coordination of proceedings.

Location and Coordination of Proceedings Related to Insolvency Resolution of Enterprise Group Companies

The UNCITRAL Legislative Guide on Insolvency Law Part III suggests the identification of a coordination centre for the group. This coordination centre might be determined by reference to the location of the parent of the group or to permit group members to apply for insolvency in the jurisdiction in which proceedings have commenced with respect to the insolvent parent of the group.[6]

In terms of the procedure to be followed for conducting insolvency proceedings for group companies, there are three methods of procedural conduct followed in domestic proceedings—joint application, substantial consolidation and procedural coordination.[7] Joint application[8] involves an application being made by all members of the group who satisfy the criteria for initiation of insolvency proceedings. Procedural coordination[9] provides for coordination of the insolvency proceedings of various group members by means like the appointment of a common insolvency professional. Substantial consolidation[10] involves the treatment of all group companies as a single entity with a consolidation of its assets. UNCITRAL

[4] *Id.* at 97.
[5] *Id.* at 98.
[6] *Id.* at 85.
[7] *Id.* at 20-74.
[8] *Id.* at 20.
[9] *Id.* at 27.
[10] *Id.* at 59.

Working Group (WG) V has released a draft legislation for facilitating transnational group insolvency.[11]

The WG identified and agreed to address areas of (a) coordination and cooperation of insolvency proceedings relating to an enterprise group; (b) elements needed for the development and approval of a group insolvency solution involving multiple entities; (c) the use of 'synthetic proceedings' in lieu of commencing non-main proceedings and (d) approval of a group insolvency solution on a more streamlined basis by reference to the adequate protection of the interests of creditors of affected group members.[12]

Model Law on Cross-border Insolvency

The Model Law on Cross-border Insolvency (MLCBI) and the EU cross-border insolvency regime (EIR) did not exclude groups from their scope; however, groups could have been and have been addressed under these regimes. In fact, many of the cross-border insolvency cases decided under the MLCBI and the EIR have been cases of groups. These instruments refer to debtors—individuals and legal entities—in insolvency proceedings, and groups are compositions of entities, they are not separate bodies. Thus, for example, the rules concerning recognition relief or cooperation enshrined in the MLCBI can be applicable to the debtors within the group.[13] The question is, however, whether a debtor-by-debtor application of the rules could result in the necessary levels of cooperation and centralisation in group cases. Global experience has demonstrated that the absence of explicit rules for groups created difficulties and uncertainties and provided leeway for territorial biases. Globally, centralisation has been mostly restricted to Canadian and the US groups and with Canadian or the US Court decisions.[14]

Regulation of Insolvency Resolution in India

As regards cross-border insolvency laws in India, under the Companies Act, 1956, a court could order the winding up of an unregistered company, which include a foreign company.[15] The Companies Act, 2013, also provides for winding up of

[11] U.N. Comm'n on Int'l Trade Law Working Group V (Insolvency Law), Enterprise Group Insolvency: Draft Model Law, U.N. Doc. A/CN.9/WG.V/WP.161 (2018), http://undocs.org/en/A/CN.9/WG.V/WP.161

[12] *Id.*

[13] Irit Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps 45 (1st ed. 2018).

[14] Irit Mevorach, *On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-border Insolvency*, 12(4) Eur. Bus. Organ. Law Rev. 517, 517-57 (2011). http://eprints.nottingham.ac.uk/1770/1/Mevorach_EBOR_2011.pdf

[15] Rajah of Vizianagaram v. Official Receiver, AIR 1962 SC 500 (India).

foreign companies.[16] However, if an Indian company with assets abroad is sought to be wound up, there is no specific statutory process for the proceedings. It is based on the mutual recognition of foreign decrees as provided for in the Code of Civil Procedure, 1908.[17] Foreign creditors could also independently proceed against the assets of the company located in the foreign jurisdiction. In the absence of such recognition, it is difficult for a liquidator to gather information on the assets and enforce the disposition of foreign assets in a liquidation.

This problem was recognized by the Justice V. Balakrishna Eradi committee in 2000. It called for the urgent adoption of the model law, in whole or in part, for India to have an effective cross-border insolvency regime. Thereafter, the N. L. Mitra committee report set out in detail the then prevailing cross-border insolvency regime and once again reiterated the recommendation for the adoption of the model law. The banking law reforms committee report, on the basis of which the current code was formulated, side-stepped the question on cross-border insolvency and stated that the committee would take up the subject in its 'next stage of deliberations'.

The Insolvency and Bankruptcy Code (IBC), 2016 ('The Code'), at present, contains only two provisions that may possibly enable and assist the liquidator with respect to a company having assets in a foreign jurisdiction. Section 234 allows the Union government to enter into reciprocal agreements with other countries to enforce the provisions of the Code. Section 235 envisages a 'Letter of Request' by the liquidator for action on the assets of the company situated in another country. However, there must exist a reciprocal arrangement with such a country. The Code applies to companies and individuals. It provides for a time-bound process to resolve insolvency. When a default in repayment occurs, creditors gain control over debtor's assets and they must take decisions to resolve insolvency within a 180-day period.[18] To ensure an uninterrupted resolution process, the Code also provides immunity to debtors from resolution claims of creditors during this period. The Code also consolidates provisions of the current legislative framework to form a common forum for debtors and creditors of all classes to resolve insolvency.[19]

The requirement of the separate regime for cross-border insolvency was felt by the Ministry of Corporate Affairs which issued a public notice inviting comments and suggestions on the proposed chapter on cross-border insolvency it plans to introduce under the Code, broadly based on the United Nations Commission on International Trade Law Model Law on Cross-border Insolvency (the 'UNCITRAL Model Law').[20]

[16] Companies Act, No 18 of 2013, §§ 375-378, India Code (2013), http://indiacode.nic.in
[17] Code Civ. Proc., §13 (India).
[18] Lok Sabha Secretariat. Report of the Joint Committee on the Insolvency and Bankruptcy Code 2015 (2016), http://164.100.47.134/lsscommittee/Joint%20Committee%20on%20Insolvency%20and%20Bankruptcy%20Code,%202015/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf
[19] Aravind Gayam, *The Insolvency and Bankruptcy Code: All You Need to Know* (May 10, 2016), https://www.prsindia.org/hi/theprsblog/insolvency-and-bankruptcy-code-all-you-need-know
[20] Government of India. Insolvency Section File No. 30/27/2018. Public Notice (June 20, 2018, http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf

The cross-border insolvency issues could be triggered by a number of circumstances, and in particular, in the Indian context:

a. Where creditors of an Indian debtor wish to enforce their rights over the assets of an Indian debtor, which are located overseas;
b. Where the creditors of a foreign debtor wish to enforce their rights over the assets of that foreign debtor in India and
c. Where Indian creditors to a foreign debtor wish to enforce their rights over the assets of that foreign debtor in a foreign jurisdiction.

A foreign creditor can initiate or be a part of any insolvency proceedings against an Indian debtor, commenced under the Code in India. The issues stemming out of these scenarios are complex, and cross-border insolvency inevitably throws up concerns among creditors across jurisdictions over how their individual claims may get addressed by the initiation of insolvency (or restructuring) proceedings against the debtor.

The treatment of financially distressed debtors, with assets across jurisdictions, has two main theoretical approaches, and a third, more practical model.

1. There is the *territorial* approach, which broadly sets out that each jurisdiction applies its own laws over assets located in that jurisdiction to the exclusion of other jurisdictions.
2. There is the *universalist* approach with a single administrator applying a single global regime over assets, across borders.
3. There is the *hybrid* approach, where jurisdictions try and work out the most relevant centre for conducting the proceedings with cooperation from other jurisdictions in relation to assets that may be located there.

While the Code permits the government to enter into treaties to implement the UNCITRAL Model Law, negotiating up to 200 separate bilateral treaties in a relatively short space of time is just not practical, and it would further complicate matters, with the Indian courts having to take into account the nuances of each treaty in any cross-border insolvency matter. Surely, the simplest solution is for India to simply sign and ratify the UNCITRAL Model Law and then incorporate that into the Code.

Single Entity Approach versus Enterprise Approach

Separate entity status of a corporation allows a corporation to own assets in its name, distinct from the personal assets of its owners, in addition to other benefits such as perpetual existence, right to sue and be sued, and common seal.[21] In the

[21] H. Hansmann and R. Kraakman, *The Essential Role of Organizational Law*, 110(3) Yale L. J. 390, 387-440 (2000).

context of enterprise groups, adherence to the 'single entity' or 'limited liability' principle typically requires directors to promote the success and pursue the interests of the company they direct, respecting the limited liability of that company and ensuring that its interests are not sacrificed to those of the enterprise group.[22] Some authorities contend that the current economic analysis of corporate law supports this 'limited liability' or 'entity' approach in dealing with the corporate groups on the grounds of efficiency as it facilitates in minimizing the transaction costs of stakeholders and maximizing shareholder returns.[23]

However, after the rise of globalization, the 'single entity' approach has created many practical problems in dealing with insolvency of group members of enterprise groups, especially those which have highly interdependent operations. This is particularly true for large multinational groups which may have a large number of subsidiaries, sometimes even up to 1,200, making it almost impossible for an outsider to discern true legal relations between all group members.[24] WG V noted some common problems associated with adherence of 'single entity' principle in relation to group members such as: effect of insolvency on the enterprise group where multiple group members are dependent upon the insolvent group member for supply of raw material, finance, logistics etc.; identifying interests of different group members by a director who acts as such or holds a managerial or executive position in one or more group members of same enterprise group and where a group member enters into cross-guarantees with other group members to assist the group as a whole to use its assets more effectively in financing group operations.[25]

It was aptly noted by Rogers C. J. in *Qintex Australia Finance Ltd* v. *Schroders Australia Ltd*[26] that:

> In the everyday rush and bustle of commercial life in the last decade it was seldom that participants to transactions involving conglomerates with a large number of subsidiaries paused to consider which of the subsidiaries should become the contracting party.

The 'enterprise approach', on the other hand, disregards the fiction of separate legal personality for corporate group members and adopts a more realistic view of the corporate enterprise where such groups operate economically as a unified whole.[27] As far as insolvency of group members of enterprise groups or enterprise groups as whole is concerned, this is the most practical approach which takes into account array of factors such as position of a group member in the group, degree of integration between enterprise group members etc. which are not considered

[22] Working Group V (Insolvency Law), UNCITRAL, Directors' Obligations in the Period Approaching Insolvency: Enterprise Groups 4 (2017).

[23] Jenny Dickfos, Directors' Duties under an Enterprise Approach, Presented at the Insolvency Academics Workshop, Adelaide (2009). Griffith Research Online, https://research-repository.griffith.edu.au/handle/10072/31792

[24] U.N. Comm'n on Int'l Trade Law, *supra* note 1, at 10.

[25] *Id.* at 4-5.

[26] Qintex Australia Finance Ltd. v Schroders Australia Ltd (1990) 3 ACSR 267 (Austl.).

[27] Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47(3) Colum. L. Rev. 343-58 (1947).

under the ‘single entity’ approach. However, most legal systems, especially those of common law countries, subscribe to the ‘single entity’ approach in their corporate laws and have not yet legislated upon treatment of insolvency of enterprise group. It is important to note that the recommendations contained in section two of Part IV of UNCITRAL Legislative Guide on Insolvency Law (2017), have been drafted by adhering to the enterprise approach.

Nature of Obligation of Directors

In the case of an individual company, as long as it is solvent, the liability of the directors is mainly towards the company, that is, liability is towards the shareholders of the company. Whereas it has been widely accepted that when a company becomes insolvent, the focus of directors ought to shift from ‘earning profit for wealth maximization of the shareholders’ to ‘minimizing the loss to and safeguarding the interests of the creditors’.[28] The rationale behind this system was succinctly explained by the Bankruptcy Law Reform Committee (India) as[29]:

> As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place (i.e. when the entity becomes insolvent), control is supposed to transfer to the creditors; equity owners have no say.

Insolvency laws in most countries expressly provide for various liabilities of the directors in the period approaching insolvency. These liabilities include liability for avoidance transactions (i.e., preferential transactions, undervalued transactions etc.), wrongful trading, fraudulent trading, misfeasance etc. Different legal systems provide for different ways for apportionment of liability for aforementioned acts like some laws provide for general rulemaking—all directors jointly and severally liable for failure to meet obligations, some give the court discretion to determine the extent of liability of each director, while others provide for different liabilities for independent and internal directors.[30]

Whereas in the case of enterprise groups, an addition dimension is added to the liability of the directors in the period approaching insolvency. Directors of a group company not only have the liabilities towards the group company under the applicable corporate laws but may also be required to promote and safeguard the interests of the enterprise group as a whole.

[28] Winkworth v. Edward Baron Development Ltd., 4 (1986) 1 WLR 1512, 15; Kinsella v. Russell (1986) 4 ACLC 215; Re Frederick Inns Ltd., 2 (1993) IES 1, 47; Geyer v. Ingersoll Publications Co, 621 A 2d 784 (Del Ch 1992); In re Healthco International Inc. (1997) 208 BR 28.

[29] Bankruptcy Law Reform Committee, The Report of Bankruptcy Law Reform Committee Volume I: Rationale and Design 10 (2015), http://ibbi.gov.in/BLRCReportVol1_04112015.pdf

[30] U.N. Comm’n on Int’l Trade Law, *supra* note 1, at 20.

The *Bell Group* Case[31] perfectly exemplifies this phenomenon where directors neglected the interests of the group companies directed by them in the interest of the group as a whole. In this case, the enterprise group was in financial difficulties and a consortium of 20 banks agreed to lend around $300 million to the major group members by taking security that said group companies did not have. Ultimately, Bell Group went into liquidation and unsurprisingly, the banks got paid out quickly. However, the liquidator of proceedings, acting on behalf of unsecured creditors, claimed that the directors of Bell Group had breached their duties towards the group companies and that the banks were in a sense knowing participants in that breach of duty. This claim was accepted by the court of first instance and later upheld by the Court of Appeals and the High Court of Australia, which, nonetheless, struck down the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (WA) upon finding it to be inconsistent with provisions of the Income Tax Assessment Act 1936 (Cth) and the Taxation Administration Act 1953 (Cth) (collectively, the Tax Acts).[32]

Where an enterprise group has members situated in different countries, the task of affixing liability upon directors becomes even harder. International character of a multinational enterprise group enables the top management to commit misfeasance, frauds etc. in a number of different ways, namely assets may be shuttled outside the jurisdiction to a foreign subsidiary; a particular foreign subsidiary may be abandoned (although it may have been previously presented as supported by the international group) in order to evade liability as the jurisdiction of the subsidiary may lack remedies for such situations etc.[33] Moreover, very few jurisdictions provide for laws governing insolvency of domestic enterprise groups let alone multinational enterprise groups.

In this regard, WG V notes that sometimes director of group company might resort to actions for benefit of the enterprise group as whole which might appear to be detrimental to the interests of the directed company, on the first glance, but will ultimately achieve a better result for it and ensure the continuation of its business and maximization of its value.[34] It further recommended the directors of group companies, in order to avoid liability for their actions during the 'twilight period', to follow the 'no worse off' principle, that is, creditors will not be worse off under the steps that are taken for benefit of the entire group than they would have been had those steps not been taken.[35] Additionally, a director may 'organize

[31] Westpac Banking Corporation v. The Bell Group Ltd, (In Liq) (2012) WASCA 157 CACV 52 of 2009. See also, Summary of the case as available at http://www.parliament.wa.gov.au/parliament/commit.nsf/($lookupRelatedDocsByID)/4D8C92EB836E6BBF48257EE3002FEA90/$file/Bell<hig>+</hig>Group<hig>+</hig>Litigation<hig>+</hig>Presentation<hig>+</hig>by<hig>+</hig>SSO<hig>+</hig>(redacted<hig>+</hig>version).pdf

[32] Bell Group N.V. (in liquidation) v. Western Australia, (2016) HCA 21; W.A. Glendinning & Associates Pty Ltd v. Western Australia, (2016) HCA 21; Maranoa Transport Pty Ltd (in liq) v. Western Australia, (2016) HCA 21 (Austl.).

[33] Irit Mevorach, Insolvency within Multinational Group 286 (2009).

[34] U.N. Comm'n on Int'l Trade Law, *supra* note 1, at 6.

[35] *Id.*

informal negotiations with creditors, like voluntary restructuring negotiations, with a view to devising a solution for the enterprise group as a whole or some of its parts where that will benefit the directed group member'.[36]

Who Is a Director?

There is no universal definition given to the term 'director', especially in the context of insolvency laws. Generally, a director is a person who is appointed as such and who has the responsibility for determining and implementing the company's policy.

As per UNCITRAL Legislative Guide on Insolvency Law,[37] Part IV: Directors' Obligations in the Period Approaching Insolvency', a director would include owners of a company, formally appointed directors, (who may be independent outsiders or officers or managers of a company serving as executive directors, referred to as 'inside directors') and non-appointed individuals and entities, including directors who are third parties acting as de facto or 'shadow' directors. 'De facto' means a person acting as a director but who has not been formally appointed as such. 'Shadow director' would mean a person in accordance with whose instructions the directors of a company are accustomed to act. It is to be noted that the term 'shadow director' has not been used under Indian Companies Act, 2013, nonetheless, the definition of promoter under S. 2(69) of the Act includes within its meaning 'shadow director' as defined under S. 251 of Insolvency Act, 1986. Furthermore, in some cases special advisors, lenders and bankers may also be treated as 'shadow directors'.[38]

As for enterprise groups, in addition to the persons mentioned above, the parent company may be deemed as director of a subsidiary company. If the group is 'integrated centralised' via the parent company, the parent company may be liable for the harmful mismanagement. This might be the case where the subsidiary has no significant autonomy and overall strategic control of the subsidiary lies with the parent company.[39] Beyond the parent–subsidiary relationship, lack of autonomy of a group member may make it difficult to identify directors who were truly responsible for its affairs in many other circumstances such as where the boards of the two members consist of substantially the same persons and where one group member controls the management and financial decision-making of the group. Even shadow director of another group member might be considered director of another group member.[40]

[36] *Id.* at 7.

[37] U.N. Comm'n on Int'l Trade Law, UNCITRAL's Legislative Guide on Insolvency Law, Part Four: Directors' Obligations in the Period Approaching Insolvency, U.N. Sales No. E.13.V.10 (2013), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part4-ebook-e.pdf

[38] U.N. Comm'n on Int'l Trade Law, *supra* note 1, at 16-17.

[39] Mevorach, *supra* note 14, at 316.

[40] U.N. Comm'n on Int'l Trade Law, *supra* note 1, at 9.

Determination and Enforcement of Liability

Determination of Liability

Over the years, many different standards have been chosen under different legal systems for determination of liability of directors for 'wrongful trading' or 'insolvent trading'. The most crucial aspect of determination of such liability is to find the point from which a company could be deemed to have become insolvent, that is, to find the starting point of 'zone of insolvency'. Some laws consider 'factual insolvency', that is, when insolvency proceedings where initiated as starting point of 'zone of insolvency', whereas others, including the United Kingdom and India, consider insolvency to have begun from the moment the director knew or ought to have known of the insolvency of the company. Objective and subjective tests are applied for determining knowledge of the director.

As for quantification of the liability, different laws provide for different standards. Under some laws, the difference between the value of the company's assets at the time it should have ceased trading and the time it actually ceased trading is considered. While under other laws, the difference between the position of creditors and the company after the breach and their position if the breach has not taken place is considered.[41]

In case of enterprise groups, law related to the determination of liability of the directors is not as clear as it is in the case of individual companies. The reason for this is that there are many problems peculiar to enterprise groups which arise while determining the liability of the directors. One such problem is of determining the liability of a person who is appointed as or is functioning as a director in more than one group companies. This issue was recently addressed by UNCITRAL's WG V. In a situation where a director is to look after interests of one or more directed group members in addition to the interest of enterprise group as whole, conflict of obligation may arise and nature and complexity of such conflict may relate to the position of the directed entities in the group hierarchy, the related degree of integration between group members, and the incidence of control and ownership. The WG prescribed certain reasonable steps in Recommendation 270 which a director facing conflicting obligations could take to manage such conflicts and these steps are:[42] (a) obtaining advice to establish the nature and extent of the different obligations; (b) identifying the parties to whom the conflict of obligations must be disclosed and disclosing relevant information, including, in particular, the nature and extent of the conflict; (c) identifying when the director should not (i) participate in any decision by the boards of directors of any of the relevant group members on the matters giving rise to such conflicts or (ii) be present at any board meeting at which such issues are to be considered; (d) seeking the appointment of an additional director when the conflicting obligations cannot be reconciled and (e) as a last resort, where

41 *Id.* at 20 & 22.
42 *Id.* at 11.

there is no alternative course of action is available, resigning from the relevant board(s) of directors.

Enforcement of Liability

In case of individual companies, for both domestic insolvency and cross-border insolvency, enforcement of liability is mainly done through domestic law of the concerned state and UNCITRAL's MLCBI, if adopted and as far as applicable.

The IL&FS Saga[43]

Hearing an urgent petition moved by the Ministry of Corporate Affairs, the National Company Law Tribunal (NCLAT) had on 15 October 2018 stayed all proceedings against Infrastructure Leasing & Financial Services Limited (IL&FS) and its group of companies, which operated through a complex network of business verticals that did not squarely fall under the hold-co-subsidiary norm. Of the 302 IL&FS group companies, 133 were incorporated outside India. The remaining 169 companies, incorporated domestically, were divided into three categories on the basis of their debt servicing ability. The outstanding loan of the IL&FS group is about Rs 60,000 crore, whereas the debt is over Rs 91,000 crore. On 11 February 2019, the central government and the new board of IL&FS had submitted an affidavit detailing three categories—green, amber and red—50 were in the green, 13 amber, 80 red and eight were in different stages of resolution. The remaining 18 were yet to be classified. Those companies which had no cash were classified as red. Those with enough to pay secured creditors but not unsecured ones are amber. And those in a position to pay all creditors are green. The NCLAT allowed green firms to service debt obligations.

On 19th June 2019, the Enforcement Directorate (ED) arrested the former Joint Managing Director of IL&FS, and former Managing Director of the company's subsidiary IL&FS Transportation Networks Limited (ITNL), as part of its money-laundering probe in the IL&FS payment default crisis. ED had registered a case on the basis of a separate FIR registered by Delhi Police's Economic Offence Wing (EOW) for allegations related to cheating and forgery against the IL&FS group and its managing committee that took place between 2010 and 2018. The ED is examining whether funds generated illegally were laundered to

43 Union of India v. Infrastructure Leasing & Financial Services Limited & Ors, Company Appeal No. 346 of 2018 NCLAT (India); Indian Express, *NCLAT Allows IL&FS to Declare 'Amber' Companies as 'Green'*, May 30, 2019, https://indianexpress.com/article/business/companies/nclat-allows-ilfs-to-declare-amber-companies-as-green-5755393/; Karunjit Singh, *IL&FS May Soon Begin Servicing Debt of 13 Group Entities*, The Economic Times May 29, 2019, https://economictimes.indiatimes.com/industry/banking/finance/nclat-asks-ilfs-firms-classified-green-to-start-paying-debts/articleshow/69566650.cms?from<hig>=</hig>mdr

create ill-gotten assets.[44] A similar criminal investigation is ongoing against certain other officials of this vast group promoted by the Central Bank of India (CBI), Housing Development Finance Corporation Limited (HDFC) and Unit Trust of India (UTI). Over the years, IL&FS has broad-based its shareholding and inducted institutional shareholders including State Bank of India, Life Insurance Corporation of India, ORIX Corporation—Japan and Abu Dhabi Investment Authority.[45]

The IL&FS Group insolvency has posed novel challenges for the nascent insolvency resolution regime in India under the IBC, 2016. The holding company/parent that took the majority of the loans, worth Rs. 91,000 crores approximately had assets of only around Rs. 7,000 crores. The money borrowed was channelled through the opaque network of over 300 companies. If only the four main companies are referred to insolvency, they would be able to satisfy less than 10 per cent of the total debt. Several 'group/network companies' are earning profits but with negligible assets and liquidating them would literally be akin to 'decimating the cash cows'. The final verdict in the case is expected soon which will be a path-breaking incident for insolvency resolution process in India.

Antecedent Transactions: The Twilight Zone under IBC, 2016

Transactions considered prejudicial to the interest of the creditors, set out between sections 43 and 51 of IBC, are: preferential transactions,[46] undervalued transactions,[47] extortionate transactions[48] and fraudulent transactions.[49] These are usually resorted to upon the commencement of insolvency primarily when the resolution professional and the resolution applicant have strong reasons to examine such transactions undertaken by the directors of an insolvent company.

Judicial Solutions

More often in group cases, recognition was less smooth and involved a process of dealing with objections and appeals. One example involves the proceedings

[44] Jayshree P. Upadhyay, *Mumbai ED Arrests Two Former Directors of IL&FS in PMLA Probe*, Live Mint June 19, 2019, https://www.livemint.com/companies/news/mumbai-ed-arrests-two-former-directors-of-il-fs-1560961954447.html

[45] IL&FS, About IL&FS, http://www.ilfsengg.com/html/about_ILFS.php (July 13, 2019).

[46] Insolvency and Bankruptcy Code, No. 31 of 2016, § 43, India Code (2016), http://indiacode.nic.in (Preferential Claims, the anterior period is 12 months, and two years if preference was given to a related party).

[47] *Id*., § 45, India Code (2016), http://indiacode.nic.in (Undervalued Transactions-the same anterior criteria as u/s 43).

[48] *Id*., § 50, India Code (2016), http://indiacode.nic.in (Extortionate Credit Transactions-have a single anterior period of two years).

[49] *Id*., § 49 & 66, India Code (2016), http://indiacode.nic.in (Transactions Defrauding Creditors-the claim has no time limit).

concerning the Canadian group, Main Knitting Inc.[50] In this case, a Canadian representative sought recognition in Southern District of New York, the USA, as main proceedings opened in Canada against the Canadian registered parent company and two US registered subsidiaries, as they were all centrally controlled in Canada. Creditors in the USA objected to such a proposal as the US subsidiaries had a significant presence in the USA. Eventually, the parties reached a settlement which safeguarded certain rights of the US creditors regarding their claims against the US assets to which the recognition order was subject. In Stanford,[51] a UK Court denied recognition of the US receivership, finding that the centre of main interest (COMI) of the Stanford subsidiary was in Antigua and not in the USA, which was the centre of fraudulent activities of the Stanford group.

In another case,[52] creditors opposed the inclusion of a separate US legal entity in a French liquidation proceeding, arguing that such an approach would contravene public policy. The US Court's recognition order excluded this entity. Ultimately, the parties decided to dismiss this petition in its entirety and to coordinate between French liquidation and the US reorganisation proceedings.[53] Furthermore, in the USA, Canada and elsewhere, there were other group insolvencies where proceedings were not opened in the same jurisdiction. Consequently, in these cases, there was no recognition process concerning all relevant group members under the MLCBI or otherwise, such a process encompassed only parts of the insolvent group.[54] The absence of a clear approach concerning group centralisations might have influenced the path undertaken by professionals and parties involved in proceedings concerning members of enterprise groups.[55]

Conclusion

As for enterprise groups, as pointed earlier, very few jurisdictions have laws governing insolvency of enterprise groups and hitherto, no significant development has been made in international law on this subject as well. However, WG V has

[50] In re Main K. Nitting Inc. Et al, Nos 08 (11272, 11273, 274) (Bankr NDNY 2008).

[51] In re Stanford International Bank Limited (2009) EWHC 1441 (Ch).

[52] In re Euro-Lodging American Corporation, Case No 06–11325 (SMB) (Bankr SDNY) decided on 9 January 2007; mentions the details of the intertwined and connected to the French consolidation case, where in February 2001, three entities, S.N.C. Summersun et cie, S.A. Summersun and S.A.R.L. Summersun Paris (collectively, 'Summersun') were placed into judicial liquidation in the Commercial Court of Antibes. Subsequently Chapter 15 Proceedings were filed, in the case In re SNC Summersun et cie, (Case no. 06–10955) in May 2006, https://www.govinfo.gov/content/pkg/USCOURTS-nysb-1_06-bk-11325/pdf/USCOURTS-nysb-1_06-bk-11325–0.pdf

[53] *Id.* at 8, Order Granting Recognition and Relief in Aid of Foreign Main Proceedings, dated Aug. 10, 2006 (Case no. 06–10955) (ECFDoc. # 23.)

[54] For example (1) In Re Spansion Japan Limited, No 09–11480 (Bankr D Del 2009), it was mentioned that US reorganization proceedings were opened against the Japanese company. (2) In re Mecachrome International Inc, No 09–24076 (Bankr CD Cal 2009), recognition of Canadian proceedings was sought in the United States, while a restructuring process against the subsidiaries was going on in France. (3) In re Nortel Networks Corporation, et al, No 09–10164 (Bankr D Del 2009) Nortel filed bankruptcy proceedings in the United States, Canada and the United Kingdom, proceedings regarding part of the group were opened in Canada and regarding another part in the UK.

[55] Irit Mevorach, *supra* note 13.

recently published draft legislative provisions for facilitating the cross-border insolvency of multinational enterprise groups. It provides for provisions for cooperation and coordination of proceedings in different jurisdiction regarding a same enterprise group and further a mechanism for conducting group insolvency proceedings (called 'planning proceedings') by appointing a single group insolvency representative with an aim of designing a 'group insolvency solution' which would be applicable to the enterprise group at large. These provisions could become either a supplement to existing MLCBI or a separate model law, to induce more uniform application of international insolvency law.[56] Nonetheless, opting for 'planning proceedings' mechanism is only discretional as per Art. 11(6) of the draft provisions and the cooperation and coordination provisions could be applied independently. It has been opined that situations may arise where some group members may refuse to cooperate and coordinate or some local courts might be reluctant in surrendering their control in the home jurisdiction, diluting the effect of these provisions.[57]

It must be noted that the above-mentioned draft provisions are silent about directors' obligation for insolvent trading etc. and therefore, in absence of such provision, these matters would be dealt with by the domestic law of the host jurisdiction (which is likely to be the jurisdiction where COMI of the enterprise group lies),[58] if it exists, or else by applying law derived from other sources of international law, namely opinions of jurists, foreign judgments etc. As far as enforcement of judgments is concerned, in order to facilitate enforcement of insolvency-related judgments, the WG has published draft UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgment,[59] the efficacy of which is dependent upon its universal adoption. The issue of conducting insolvency proceedings for enterprise groups is a complicated exercise. Varying policy motives and differing principles underlying insolvency laws across jurisdictions complicate the conduct of insolvency proceedings against members of an enterprise group. The Insolvency and Bankruptcy Board of India has earlier this year constituted a WG on Group Insolvency to submit a report recommending a complete regulatory framework to facilitate insolvency resolution and liquidation of corporate debtors in a group. The WG may consider the above-mentioned issues in designing a framework for group insolvency, while also considering the draft released by the UNCITRAL WG V as the basis for dealing with insolvency resolution of group companies.

The contemporary debate in India is still focused around whether to adopt the MLCBI, 1997. The contemporary deliberation in the international forums like UNCITRAL is now focused upon insolvency resolution of enterprise groups, recognition and enforcement of insolvency-related judgments, and drafting a suitable instrument towards that objective. Over two decades have passed since the

[56] Irit Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps 230 (1st ed. 2018).
[57] *Id.* at 234.
[58] *Id.* at 237.
[59] U.N. Comm'n on Int'l Trade Law, UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018), http://www.uncitral.org/pdf/english/texts/insolven/Interim_MLIJ.pdf

MLCBI was adopted on 30 May 1997.[60] After enacting the IBC, it is important for India to focus upon the present day needs along with the current global law reform process, whilst drafting/adopting an appropriate law governing enterprise group insolvencies, in addition to it moving ahead in the direction to adopt a regime on cross-border insolvency.

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[60] U.N. Comm'n on Int'l Trade Law, UNCITRAL Model Law on Cross-Border Insolvency (1997) http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html