REPORT OF CBIRC-II ON GROUP INSOLVENCY

December, 2021

CROSS BORDER INSOLVENCY RULES/REGULATIONS COMMITTEE (CBIRC-II)

New Delhi, December 10, 2021

To
Secretary to Government of India
Ministry of Corporate Affairs
'A' Wing, Shastri Bhawan
New Delhi - 110001

Dear Sir,

We have the privilege and honour to present the second part of the Committee's Report to the Ministry of Corporate Affairs. The Cross-Border Insolvency Rules/Regulation Committee (CBIRC) which was constituted, vide office order No. 30/27/2018-Insolvency Section dated 23rd January, 2020, submitted first part of its report on the rules and regulatory framework for cross border insolvency on 15th June, 2020. On 21st February, 2020, the remit of CBIRC was expanded to analyse the UNCITRAL Model Law on Enterprise Group Insolvency and to make recommendations governing the resolution of group enterprises for the purpose of the IBC.

2. The CBIRC has adopted a holistic methodology including internal meetings, engagement with stakeholders, examining past reports, global literature and best practices followed by other countries. The Committee, while making its recommendations, has attempted a draft Part that may be inserted in the Code to enable implementation of a suitable group insolvency framework.

3. We thank you for providing us this opportunity to put our thoughts together for recommending group insolvency provisions under the Insolvency and Bankruptcy Code, 2016 (Code). We believe that the enactment and implementation of group insolvency provisions would minimize costs and maximize the value of entities involved.

Yours sincerely,

(Dr. K.P. Krishnan)
Chairman

(A.M. Bajaj)
Member

(Challa Sreenivasulu Setty)
Member

(Harshvardhan Raghunath)
Member

(Somasekhar Sundaresan)
(Somasekhar Sundaresan)
Member

(Aparna Ravi)
Member

(Abizer Diwanji)
Member

(Methil Unnikrishnan)
Member

Acknowledgments

The Cross Border Insolvency Rules/Regulations Committee (CBIRC) is submitting the second part of its Report on enterprise group insolvency based upon UNCITRAL Model Law for enterprise group insolvency. The Committee makes certain recommendations in the context of the Insolvency and Bankruptcy Code, 2016 to operationalise the group Insolvency part.

The Committee is thankful to all stakeholders who provided insightful comments and suggestions during the deliberations of the Committee. These insights from these interactions greatly helped the Committee in the drafting this Report.

The Committee deeply appreciates the support provided to it by the research team: Ms. Aishwarya Satija, Senior Resident Fellow and Mr. Oitihjya Sen, Research Fellow of Vidhi Centre for Legal Policy, Mr. Kahnav Mahajan, Advocate, Ms. Anjali Sharma and Ms. Bhargavi Zaveri, Lead Research Consultants of Finance Research Group (FRG), Mr. M.V. Pratap Kumar, Advocate, Ms. Varsha Aithala, Research Fellow of Azim Premji University (APU), Mr. Karthik Suresh, Research Fellow of National Institute of Public Finance and Policy (NIPFP), Mr. Ameya Vikram Mishra, Advocate and Mr. Yadwinder Singh, Assistant Manager of Insolvency and Bankruptcy Board of India (IBBI). The Committee is thankful to the Vidhi Centre for Legal Policy for the support provided in research and report preparation.

The Committee is grateful to Dr. M.S. Sahoo, former Chairperson, Mr. Sudhaker Shukla, Whole Time Member and Mr. Ritesh Kavdia, Executive Director of IBBI for their valuable inputs and guidance during the deliberations. The Committee is also thankful to IBBI for providing logistical, administrative and technical support for its functioning.

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Chapter I: Setting the Context

1. Introduction

The business of corporations is increasingly conducted by enterprise operating as "groups". This term covers various forms of economic organisation that are linked together by some form of ownership or control.[1] The entities within a group are legally treated as separate and distinct entities except in certain circumstances envisaged in law (like common procedural filings, liability for criminal wrongs, etc.), and yet they operate as a group, tapping into one another's efficiencies and strengths. Even decision-making for the group could reside across definitional outlines that legally define each entity within a group. Such distinct legal identity of group entities leads to various advantages[2] of conducting business in the form of groups. This has prompted group structures to become a modern global reality.[3]

Insolvency laws, like general company laws, typically respect the principle of separate legal personality of the entities in a group and deal with each entity's assets and liabilities separately. Consequently, insolvency statutes in most jurisdictions treat the insolvency proceedings of each group entity separately. However, such statutory frameworks may prove to be ignorant of economic realities and practicalities.

Where group entities are significantly interlinked, it may be value destructive to not recognise such interlinkages in insolvency law.[4] For instance, where the business of different entities in a group are dependent on each other; or various group entities have many common assets; or where there are multiple common liabilities and related party transactions amongst various group entities, it may not be feasible to conduct insolvency proceedings for each group entity in isolation. Each entity in a group being able to tap synergies with others in the group when solvent, and yet being blind to the inter-linkages when it comes to insolvency, is anomalous. At the same time, a body corporate being a distinct legal entity with perpetual succession must not be lost sight of. Accordingly, the insolvency of entities belonging to a group may raise certain distinct problems that may not arise otherwise.[5]

Such problems are further exacerbated when enterprise groups operate in a transnational setting, i.e., when groups consist of entities from at least two different countries. Insolvency proceedings of group entities may affect multiple jurisdictions if the assets, liabilities or business of a group spans across different countries. In such a scenario, linking or coordinating

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

[2] For instance, group structures may be helpful in reduction of commercial risk and maximization of financial returns, by enabling the group to diversify its activities into various types of businesses, each operated by a separate group entity. Such structures may also be helpful in segregating capital as well as liabilities among various entities. Further, if the businesses of the group entities are linked, such structures may also help in enabling spill-over benefits within the group. *See* Report of the Working Group, Page 12.

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

[4] *See* for instance, Deborshi Chaki, 'Creditors may offer to sell Amtek Auto along with subsidiaries' Livemint, (Mumbai 27 February 2018).

[5] Daoning Zhang, 'Insolvency Law and Multinational Groups, Theories, Solutions and Recommendations for Business Failure' (Routledge Research in Corporate Law, 2020).

insolvency proceedings of group entities will also require answering questions of cross-border insolvency. This includes determining the appropriate forum that will have jurisdiction to oversee the insolvency proceeding(s) of group entities; identifying the law applicable to each such proceeding, and agreeing on the manner of recognising such proceedings in other relevant jurisdictions.[6]

International practice in the last couple of decades has attracted the attention of various policy makers, globally, to the special challenges posed in effectively resolving insolvency of group entities. International instruments like the UNCITRAL Legislative Guide to Insolvency Law Part 3 ("**UNCITRAL Legislative Guide**"), the UNCITRAL Model Law on Enterprise Group Insolvency ("**MLEGI**"), and the EU Regulation 2015/848 on Insolvency Proceedings (recast) ("**EU Regulations**") have also been developed to provide guidance on the subject. Even domestically, issues related to enterprise group insolvency have arisen in practice.

With the introduction of the Insolvency and Bankruptcy Code, 2016 ("**Code/ IBC**"), India consolidated the fragmented laws relating to *inter alia* reorganisation, insolvency resolution and liquidation of corporate persons. Although the Code comprehensively deals with the insolvency of corporate debtors as separate entities, it does not envisage a framework to either coordinate insolvency proceedings of corporate debtors belonging to a group or to have a common resolution for them. Consequently, the insolvency of different corporate debtors belonging to the same group is dealt with through separate insolvency proceedings for each corporate debtor.

However, in recent cases under the Code like "*Videocon, Era infrastructure, Lanco, Educomp, Amtek, Adel, Jaypee and Aircel*, *special issues arose from their interconnections with other group companies.*"[7] Due to this, the Insolvency and Bankruptcy Board of India ("**IBBI**") constituted a 'Working Group on Group Insolvency' ("**Working Group**") under the Chairmanship of Mr. U. K. Sinha, through an office order dated 17 January 2019. The Working Group consulted various stakeholders and undertook a detailed analysis of various issues that may arise in resolving insolvency of group entities in India. Based on this, it released a report on 23 September 2019 providing comprehensive recommendations for establishing an enabling framework for group insolvency that may be implemented in phases.

Around this time, the UNCITRAL adopted the MLEGI which is a model legislation providing a comprehensive framework for domestic as well as cross-border insolvency of enterprise groups.[8] Similar to other model laws released by the UNCITRAL in respect of insolvency law, the MLEGI is meant to be a flexible instrument that various countries may consider adopting, with necessary modifications. To build on the work undertaken by the Working Group, the Ministry of Corporate Affairs ("**MCA**") constituted this Committee under the chairmanship of

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[6] *See* Rosalind Mason, 'Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet' in Paul J. Omar (ed), *International Insolvency Law Themes and Perspectives* (2008, Ashgate) 40; Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP, 2009).

[7] Report of the Working Group, Page 7.

[8] Although the MLEGI seems to build on the UNCITRAL Legislative Guide's recommendations for coordinating insolvency of enterprise groups domestically, and therefore may have to be read with the Guide to give a full picture of the proposed domestic group insolvency framework.

Dr. K.P. Krishnan to analyse the MLEGI through office order dated 21 Feb 2020 (as an addendum to its previous office order dated 23 January 2020), provided in **Annexure I**. The mandate of this Committee was to submit a report providing recommendations for group insolvency based on a review of the recommendations of the MLEGI and the Code. Prior to this, the Committee had been working on rules and regulations for cross-border insolvency under the Code and had submitted a report in this regard to the MCA on 15 June, 2020.

The Committee appreciated the recommendations of the Working Group and greatly benefited from the elaborate discussion in its report. To fulfil its mandate, the Committee consulted several stakeholders and experts, and examined relevant legal and regulatory principles as well as global best practices. Based on this, the Committee submits this report ("**Report**") recommending a draft framework to facilitate insolvency resolution and liquidation of corporate debtors in a group in India, as well as recommendations of the Committee on adoption of the MLEGI.

2. Working Process of the Committee

The Committee adopted a holistic methodology including internal meetings, engagement with stakeholders, examining past reports, global literature and best practices followed by other countries, to better understand the kinds of challenges that have and may come up, in enterprise group insolvency.

The Committee met seven times. It had its first meeting on 15 June 2020 and met subsequently on 13 July, 2020, 29 September, 2020, 27 October, 2020, 11 December, 2020, 30 January, 2021 and 28 July, 2021. During these meetings, the Committee delineated policy issues arising out of the concerns raised by the members and deliberated on the same. The deliberations of the Committee were informed by inputs from its research team, which comprised of members provided in **Annexure II.**

The Committee consulted relevant stakeholders which included academics, practitioners, judges of foreign courts, etc. The list of stakeholders who engaged with the Committee is available at **Annexure III**.

3. Structure of the Report

The report is divided into two Chapters. The present Chapter provides a background to the Report. Chapter II provides the recommendations of this Committee for the design of a group insolvency framework under the Code, and regarding the adoption of the MLEGI in India. The suggested draft provisions for facilitating group insolvency, which may be inserted in the Code, are provided in Annexure IV of this Report.

4. Summary of Recommendations of the Committee

i. A group insolvency framework that is voluntary, flexible and enabling in nature should be provided under the Code. Such a framework may be introduced in phases. In the first phase, only provisions governing domestic group insolvency may be enacted. ***(Box 1)***

ii. The MLEGI may not be adopted in India at present, and its adoption may be considered after enactment of single entity cross border insolvency laws and based on learnings from its implementation. ***(Box 1)***

iii. Jurisprudence on substantive consolidation, i.e., pooling of assets and liabilities of an insolvent group, is already developing under the Code through case law. This is a remedy resorted to in exceptional circumstances and provisions governing substantive consolidation may not be provided in the Code at present. The need for such provisions may be contemplated at a later stage, on the basis of practice and jurisprudence evolved in this regard. ***(Box 2)***

iv. In the group insolvency framework under the Code, a broad and inclusive definition of 'group' should be provided so as to include a large number of corporate debtors within the ambit of the framework. The definition of 'group' may be based on the criteria of control and significant ownership. This definition should be applicable to all entities that fall within the definition of a 'corporate debtor' under the Code, i.e., companies and limited liability partnerships. The group insolvency framework may not apply to financial service providers notified under Section 227 of the Code. ***(Box 3)***

v. The group insolvency framework under the Code should only apply to corporate debtors in respect of whom a corporate insolvency resolution process or liquidation process is ongoing. The law shall not apply to solvent members of the group. ***(Box 4)***

vi. A list of procedural coordination mechanisms should be available under the group insolvency framework. These are discussed below. ***(Para 5)***

vii. Filing of joint applications for initiation of corporate insolvency resolution proceedings against multiple corporate debtors belonging to the same group may be permitted. Such applications may be filed with an Adjudicating Authority that has territorial jurisdiction over any one of the corporate debtors in respect of whom such joint application is being filed. Although filing jointly may be permitted, the application form for each corporate debtor should be separate. ***(Box 5)***

viii. All proceedings related to corporate debtors belonging to a group may take place under the same Adjudicating Authority. To give this effect, all pending applications and proceedings under the Code in respect of a group member may be transferred to the NCLT that is the first to admit an application for triggering an insolvency resolution process in respect of any corporate debtor belonging to the group. All new applications in respect of any group member should also be filed in such NCLT. ***(Box 6)***

ix. A common insolvency professional may be appointed as the resolution professional or liquidator of corporate debtors that belong to the same group. An insolvency professional should refuse taking such appointment if she believes that there are

conflicts of interest which may affect her functions. She may approach the Adjudicating Authority for suitable directions if conflicts arise after her appointment. ***(Box 7)***

x. A group CoC may be formed with adequate representation from CoCs of all group members (outside group coordination proceedings in points xi-xviii). This may be at discretion of the CoCs and its constitution and formation may be subject to negotiation amongst parties. The group CoC (outside of a group coordination proceeding) may only provide procedural assistance and should not be tasked with taking decisions that affect the substantive rights and obligations of the parties, which right shall continue to be available to the CoCs of the relevant group members. ***(Box 8)***

xi. The CoCs and insolvency professionals appointed in respect of corporate debtors belonging to the same group should mandatorily be required to cooperate, coordinate and share information with each other. ***(Box 9)***

xii. The law should enable group coordination proceedings for corporate debtors belonging to the same group and undergoing a corporate insolvency resolution or liquidation process under the Code. A group coordination proceeding may be opened on application made by two or more CoCs of corporate debtors belonging to a group. If the corporate debtor is in liquidation, the application may be made by the liquidator. Such applications will be made to the Adjudicating Authority. The Adjudicating Authority may open the group coordination proceedings and appoint a group coordinator (as proposed in the application and subject to eligibility criteria). The proceedings will run alongside the separate insolvency or liquidation proceedings of the corporate debtors. ***(Box 10)***

xiii. Participation of a corporate debtor in the group coordination proceeding should be voluntary. The CoCs may have flexibility to opt-in to the group coordination proceedings until 30 days after its opening. Any opt-ins after such time may be permitted with the approval of the participating CoCs and liquidators. For such approval, each CoC would have to vote in favour of such opt in by at least 50% of each of their voting shares. The participating group members may opt out of the group coordination proceedings at any time until a group strategy has been approved by their respective CoC. ***(Box 10)***

xiv. The group coordinator shall constitute a group CoC consisting of suitable representatives from CoCs of all participating group members. The group CoC (in group coordination proceeding) may perform functions delegated to it by separate CoCs. However, the power to approve a resolution plan shall not be permitted to be delegated to the group CoC. ***(Box 10)***

xv. The group coordinator will conduct the group coordination proceedings and develop a group strategy. A group strategy may provide various combinations of measures that synchronise the insolvency resolution or liquidation proceedings of

the participating corporate debtors. Such measures may be different for different companies included in the strategy. The group coordinator will also assist the resolution professionals, liquidators and CoCs of the corporate debtors so as to enable effective coordination amongst them. ***(Box 10)***

xvi. A group strategy should require the approval of all participating CoCs by 66% of each of their voting shares respectively. Where a corporate debtor participating in a group coordination proceeding is undergoing liquidation, the liquidator should decide whether to approve the group strategy for the corporate debtor it represents. Once approved, the group strategy shall be filed with the Adjudicating Authority and shall be binding on all parties to the group strategy. ***(Box 10)***

xvii. A group coordination proceeding shall terminate if the group coordinator applies for a termination order, which may be on the grounds that – (a) the group strategy has been approved and fully implemented; (b) the CoCs and liquidators have approved such termination by requisite majority; (c) the CoCs and liquidators have failed to approve a group strategy and the group coordinator is of the opinion that it is not feasible for participating group members to agree on a group strategy. ***(Box 10)***

xviii. The costs of conducting group coordination proceedings should form part of the insolvency resolution or liquidation process costs of the participating group members. Further, where group coordination proceedings are opened, an additional 90 days may be added to the time period for completion of the insolvency resolution process for the participating corporate debtors. ***(Box 10)***

xix. Specific provisions to deal with perverse behaviour may not be required as provisions dealing with avoidance actions and fraudulent or wrongful trading under the Code may be sufficient. Detailed provisions targeting perverse behaviour in group insolvency scenarios should be legislated based on practice developed under the Code in due course. ***(Para 6)***

xx. Effective capacity building measures and increase in use of technology during implementation will bolster the efficiency of the group insolvency framework. ***(Para 8)***

Chapter II: Designing a Group Insolvency Framework for India

1. Background

1.1. Need for a comprehensive group insolvency framework

The Committee took note of the progress made in respect of group insolvency in India. It is essential to note that in the mere five years since the enactment of the Code, issues related to interconnectedness of group companies have arisen in several insolvency proceedings. This has demonstrated that there are certain special issues that may arise in the insolvency of group companies, which are distinct from the concerns that arise in single-entity insolvency proceedings.

Primarily, companies in a group may be inter-linked with each other in various ways. It is common for the operations or finances of group members to be connected to each other, and consequently, group members may undertake many related party transactions with each other.[9] Disentangling the ownership of assets and liabilities and identifying the creditors of each group member may involve a complex and costly legal inquiry.[10] Such disentangling may become essential if single-entity insolvency proceedings are to be carried out for more than one group member. This may be value-destructive especially where utilising synergies of the group members may result in availing better value for stakeholders. For instance, where operations and supply chains of group members are inter-linked with each other, it may be value-maximising to permit resolution applicants to bid for such group companies in a single offering.

Further, disentangling assets and liabilities of highly inter-linked group companies may actually go against the expectations and interests of creditors. Although companies are treated as separate legal entities even if they are a part of a group structure, lenders often consider the financials of the whole group when making lending decisions in respect of group members. This is especially the case when the group operates as a single economic entity in reality. Mevorach notes that strict adherence to limited liability may externalise "*some of the costs of the enterprise with risks falling on outsiders*"[11], like creditors. Although an efficient market hypothesis posits that creditors would have adequate information about the group structure to calculate risks associated with lending to its group members, this may only be true in theory.[12] In reality, creditors often lack access to adequate information and resources to calculate such risks especially where the companies have utilised a complex group structure.[13] The costs of availing adequate information for calculating such risks may also be higher than the amount of

[9] UNCITRAL Legislative Guide on Insolvency Law, Para 92.

[10] *Ibid.*

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

[12] *Ibid.*

[13] *Ibid.*

the transaction in some instances.[14] Moreover, although sophisticated creditors may be well placed to make such decisions with more accuracy, dispersed and unsophisticated creditors will not have the means or incentives to undertake comprehensive and costly analyses of the degree of integration of group companies.

Therefore, adopting a purely single-entity approach in the insolvency of group members may be divergent from the economic realities of the group as viewed by stakeholders. This raises concerns about the manner of integrating or coordinating insolvency proceedings of group companies in a manner that aligns with the economic realities of the group and leads to maximisation of value. As noted above, although the Code comprehensively deals with the insolvency of corporate debtors as separate entities, it does not envisage a framework to either coordinate insolvency proceedings of corporate debtors belonging to a group or to have a common resolution for them. To address this, the Adjudicating Authorities under the Code and the Supreme Court have passed orders enabling coordination of insolvency proceedings of group members in some instances, or have applied general principles of corporate law pertaining to piercing of the corporate veil to make group companies liable for each other.[15]

The Committee took note of the above and agreed that the Code should provide guidance on the manner of undertaking insolvency proceedings of group companies that is distinct from the current single-entity approach. It discussed that since the Committee is tasked with forming recommendations regarding adoption of the MLEGI, it may be beneficial to first formulate key features of a group insolvency framework that aligns with the principles of the Code. The approach of the MLEGI may be considered alongside this to finally arrive at a suitable framework to undertake insolvency of group companies under the Code.

1.2. Overview of the recommendations of the Working Group

As noted above, the Working Group under the chairmanship of Mr. U. K. Sinha recommended principles for designing a comprehensive and effective framework for group insolvency in India. To arrive at this, the Working Group analysed the law and jurisprudence on group insolvency in jurisdictions like Germany, the UK and the US as well as international instruments like the EU Regulations and the UNCITRAL Legislative Guide. However, since the MLEGI was released shortly before the release of the report of the Working Group, the framework suggested in its report does not consider the recommendations of the MLEGI on group insolvency.

The Committee appreciated the recommendations of the Working Group and greatly benefited from the elaborate discussions provided in its report. An overview of the key components of the framework suggested by the Working group is provided below:

- The Working Group recommended that the framework for group insolvency should be voluntary and enabling in nature. It proposed a flexible mechanism that creditors or

[14] *Ibid.*

[15] Report of the Working Group, Page 20.

liquidators of group companies may opt for and is not mandatorily imposed for all group companies undergoing CIRP or liquidation under the Code.[16]

- The framework is envisaged to be implemented in phases. In the first phase, the framework would facilitate the introduction of procedural co-ordination of only domestic companies in groups and rules against perverse behaviour. Cross-border group insolvency and substantive consolidation would be considered at a later stage, depending on the experience of implementing the earlier phases of the framework.

- Various modes of procedural coordination would be available to group members. However, this would be limited to corporate debtors belonging to the group that are undergoing CIRP or liquidation proceedings and not to solvent members of the group. The procedural coordination mechanisms that would be available to such corporate debtors would include filing of joint applications; communication, cooperation and information sharing; appointment of a single or common insolvency professional; having a common Adjudicating Authority; and undertaking group coordination proceedings. Such procedural coordination may be enabled at any stage of the CIRP or liquidation process of the group members.

- The framework would have certain rules against perverse behaviour. The provisions enabling the avoidance of certain transactions and imposition of liability for wrongful and fraudulent trading may broadly be sufficient to capture intra-group transactions that are value destructive. An additional mechanism to subordinate intra-group claims in exceptional circumstances would also be available.

1.3. Overview of the MLEGI

International group insolvency poses a complex problem. Devising and agreeing upon an effective legal international instrument to address this problem is unsurprisingly a challenge. Enterprise groups comprise separate entities that are connected through ownership, control, or coordination. Although legally split into separate entities, groups are often economically, administratively, or financially integrated and therefore require some form of global group approach.[17] A coordinated response to international insolvency of enterprise groups is critical for ensuring value maximisation for the benefit of the enterprise stakeholders. Generally, harmonization and uniformity across jurisdictions is necessary to avoid the "chaos" generated by conflicting private international law rules and to allow for a fair and efficient global collective process. Due to the economic integration of the group, the

[16] However, it envisaged that the requirement to communicate, coordinate and share information should be mandatory for insolvency professionals, committees of creditors and Adjudicating Authorities of group members undergoing CIRP or liquidation under the Code.

[17] Irit Mevorach, *A Fresh View on the Hard/Soft Law Divide: Implications for International Insolvency of Enterprise Groups*, 40 MICH. J. INT'L L. 505 (2019).

insolvency of one entity affects the rest of the group, or the entire integrated enterprise faces financial or operational distress simultaneously.[18]

Various countries deal with this issue differently, leading to the lack of a uniform global approach. The MLEGI was developed against this backdrop and was adopted by the UNCITRAL in 2019. It is a flexible instrument that may be adopted by countries with modifications, as may be required, to make it suitable to the jurisdiction's domestic context. It builds on the recommendations contained in the UNCITRAL Legislative Guide, which was released in 2010. Whereas the UNCITRAL Legislative Guide concentrates on domestic group insolvency, the focus of the MLEGI is resolving the insolvency of *multinational* enterprise groups. Therefore, the provisions of the MLEGI chiefly deal with cross-border issues that may arise in the insolvency of such enterprise groups. A discussion of the key components of the MLEGI from a cross-border perspective are provided in para 7 of this Chapter.

1.4. Committee's Approach

The Committee therefore had the benefit of the framework laid down in the MLEGI in addition to the Working Group's recommendations. The Committee undertook detailed consultations with international experts on the subject of group insolvency, including judges, practitioners and academicians, to better understand the nuances and technicalities involved in dealing with corporate insolvency on a group level rather than an entity level.

Based on the above, the Committee concluded that there are several benefits of introducing a framework to deal with insolvency proceedings of corporate debtors that belong to the same group. The key benefits in this regard are provided below:

i. Firstly, acknowledging economic realities of the group in the insolvency law will lead to maximisation of value available to stakeholders. By tailoring the insolvency processes to suit the circumstances of the case, stakeholders would be able to utilise synergies of the group to achieve better outcomes from the insolvency process.

ii. Secondly, an effective group insolvency framework would facilitate the reduction in costs of the insolvency process. Coordinating or consolidating insolvency proceedings of group companies would reduce costs associated with duplication of efforts. Further, costs associated with disentangling significantly inter-linked groups may also be eliminated.

iii. Thirdly, judicial time spent on the proceedings may significantly reduce if the insolvency proceedings of group companies are dealt with in a coordinated or consolidated manner. Considering that the issues related to group insolvency often involve commercial considerations, group insolvency frameworks place substantive reliance on creditors and insolvency professionals to find optimal solutions that suit the group. On the other hand, courts are often left to find solutions to address such

[18] *Ibid.*

issues themselves in the absence of a legislative framework on group insolvency. For instance, in the insolvency proceedings of various *Videocon* companies, the Adjudicating Authorities under the Code had to devise strategies to develop the optimal manner of resolving the companies together.[19] Thus, courts would also save the time that they may have spent on finding ways to address issues related to group insolvency on an ad hoc basis.

iv. Finally, providing legislative guidance on group insolvency may make the insolvency law more effective in serving the needs of creditors. This may happen in two ways. One, since the framework promotes information symmetry between parties, creditors will have access to adequate information to facilitate better decision-making. Two, creditors may also be able to make more informed decisions *ex ante* since they will have certainty regarding the manner in which insolvency proceedings in group scenarios will take place.

Accordingly, the Committee noted that there are various benefits to designing a legislative framework for group insolvency that may be inserted in the Code. It discussed that such a framework should be enabling, flexible and voluntary in nature so as to suit different ways in which groups may be inter-linked. Thus, the Committee has prepared-

(i) a list of recommendations for designing a group insolvency framework, as detailed in this Chapter; and

(ii) a draft group insolvency framework, designed based on these recommendations, which may be inserted in the Code (**Annexure IV**). This may be referred to as 'Draft Part ZA' in this report. Notably, consequential amendments to existing provisions of the Code may also be required if this Part is inserted in the Code.

2. Jurisdictional Scope and Considerations for Adoption of the MLEGI

The treatment of corporate entities as groups instead of separate legal entities is a nascent issue in insolvency scholarship and practice. Although the practice of a few countries already accounted for coordination or consolidation of insolvency proceedings of group entities[20], global attention for this issue was garnered after the collapse of corporate giants in recent times. Despite this, the enactment of statutory provisions within insolvency laws to deal with groups has only taken place in few jurisdictions. Therefore, precedent of statutory provisions in this area is limited and practice in this regard is still evolving across the world.

[19] *See* State Bank of India & Anr. v. Videocon Industries Ltd. & Ors, M.A. 1306/ 2018 & Ors. in CP No. 02/2018 & Ors- decision dated 8 August 2019. *See also,* In the matter of Videocon Industries Ltd. And Ors., in NCLT Mumbai, dated 8 June 2021.

[20] For instance, the law in the United States envisages joint administration of insolvency proceedings of group members. *See* Rule 1015 of the Federal Rules of Bankruptcy Procedure. German insolvency law lays down provisions for procedural coordination of insolvency proceedings of debtors belonging to the same corporate group. *See for instance,* Sections 3d, 3e, 56b of the Insolvency Code of 1994 translated by Schultze & Braun GmbH & Co. KG, Insolvency and Restructuring in Germany – Yearbook 2019.

In order to promote harmonisation of laws on enterprise group insolvency on a global scale, the UNCITRAL recently adopted the MLEGI. This Committee considered whether the MLEGI should be adopted in India at this stage. Towards this end, the Committee studied the MLEGI and observed the following:

- The MLEGI is a flexible instrument that may be adopted by countries with requisite modifications to make it suitable to the jurisdiction's domestic context. It builds on the recommendations contained in the UNCITRAL Legislative Guide, which was released in 2010. Whereas the UNCITRAL Legislative Guide concentrates on domestic group insolvency, the focus of the MLEGI is resolving the insolvency of *multinational* enterprise groups. Therefore, the provisions of the MLEGI chiefly deal with cross-border issues that may arise in the insolvency of such enterprise groups.

- The complexity of the issues involved in the insolvency of group enterprises is exacerbated when different entities belonging to the group are situated in different countries. In fact, cross-border insolvency raises questions that are often difficult to resolve even in single entity insolvency. *Firstly*, the substantive laws on insolvency in different countries are unharmonized.[21] If the insolvency proceedings of group enterprises being conducted in different jurisdictions are to be coordinated or consolidated, it will often lead to a conflict concerning the appropriate applicable law. Further, the difference in the treatment of various stakeholders in different jurisdictions may also disincentivize cooperation among the countries involved with each other.[22] *Secondly,* determining the appropriate jurisdictions where the debtor may be subject to insolvency proceedings is a critical issue in cross border insolvency cases. In a group insolvency scenario, the determination of the place where proceedings of group enterprises should be consolidated is often the most contentious issue and may be prone to long, costly litigation.[23] *Thirdly,* procedures for recognition and enforcement of foreign court orders need to be established in the jurisdictions where insolvency proceedings of the group enterprises can take place.

- Determination of the above issues in a jurisdiction, in a predictable and consistent manner, can be challenging. The basis on which the above three issues are resolved is the choice that a jurisdiction makes between the approaches of territorialism, universalism and its hybrids forms.[24] This requires an assessment of the policy approach towards insolvency proceedings in foreign jurisdictions. Given that currently India has not notified about half the provisions of the Code, the absence of

[21] Daoning Zhang, 'Insolvency Law and Multinational Groups, Theories, Solutions and Recommendations for Business Failure' (Routledge Research in Corporate Law, 2020).

[22] *Ibid.*

[23] This is because the jurisdiction often determines the applicable law. *See* Rosalind Mason, 'Cross Border Insolvency: Where Private International Law and Insolvency Law Meet' in Paul Omar, 'International Insolvency Law, Themes and Perspectives' (Ashgate Publishing Company, 2008), pp. 40-41.

[24] *Ibid.*

a cross-border insolvency framework for single-entity insolvency and, the fact that the MLEGI itself is relatively nascent, the Committee felt that determining this policy approach for group insolvency of multinational firms may be premature.

- In a cross-border insolvency scenario, there are numerous ways in which groups can be structured across countries. Therefore, a law governing cross-border group insolvency will need to provide flexibility, and will inevitably involve discretion for courts and office holders, to account for various kinds of cases that may come up. Accordingly, effectively resolving the issues involved in cross-border group insolvency requires significant expertise and sophistication by officeholders, courts as well as other stakeholders in the insolvency ecosystem. Moreover, cross-border cooperation in insolvency involves communication between courts and office holders that are situated in different countries and thus, requires substantial infrastructural and administrative capacity.

- In addition to the above, the MLEGI was adopted by the UNCITRAL two years ago and has not been adopted by any country until now. Therefore, the degree of international consensus on the MLEGI and the expected modifications to it, on adoption in other jurisdictions, is yet unclear. It is important to note that model legislations that are based on universality principles may only be effective in harmonising laws if they are adopted by multiple countries.

Based on the above, **the Committee agreed that the MLEGI may not be adopted in India at present. Instead, the Committee recommends that a framework only for domestic group insolvency should be provided in the Code.** The provisions for group insolvency may be enacted and implemented in phases. In the first phase, the framework for group insolvency may only apply to domestic entities of corporate groups. Provisions on cross-border group insolvency may be enacted in the second phase, after practice and jurisprudence on single entity cross-border insolvency and domestic group insolvency has been established.

In order to nevertheless benefit from the insights provided in the MLEGI, the Committee has reviewed the framework suggested by the Working Group in light of the principles available for domestic group insolvency in the MLEGI and the UNCITRAL Legislative Guide. The recommendations of the Committee are discussed below.

Drafting Instructions (Box 1)

- The MLEGI may not be adopted by India at present.
- Adoption of the MLEGI may be considered after enactment of single entity cross border insolvency laws and based on learnings from its implementation.
- A group insolvency framework should be laid down under the Code that is voluntary, flexible and enabling in nature.
- The group insolvency framework may be introduced in phases. In the first phase, only provisions governing domestic group insolvency may be enacted.

3. Scope of Coordination under Draft Part ZA

There are broadly two kinds of coordination strategies that may be adopted in the insolvency of group companies. One, substantive consolidation is a mechanism whereby the assets and liabilities of different group companies are consolidated so that they are treated as part of a single insolvency estate for the purpose of reorganization or distribution in liquidation. On the other hand, procedural coordination may be undertaken to coordinate concurrent insolvency proceedings of group companies whereby the procedures of such proceedings are synchronised. Instead of pooling assets and liabilities of group entities, procedural coordination involves the synchronisation of various aspects of the manner in which the insolvency proceedings of group companies are administered.[25]

The Committee deliberated on the kinds of coordination that may be permitted under the group insolvency framework under the Code. Its deliberations regarding procedural coordination are provided in para 5. In order to understand the nuances of substantive consolidation, the Committee first undertook a review of international practice in this regard.

Globally, substantive consolidation of assets and liabilities of group members in insolvency is rare and is only utilised in limited circumstances. Since limited liability and entity separateness are one of the most fundamental principles of corporate law, disregarding them through substantive consolidation is perceived as a radical remedy. Nevertheless, the law or practice in many jurisdictions recognise that undertaking substantive consolidation may be beneficial in some scenarios. The UNCITRAL Legislative Guide on Insolvency Law lists down the following factors while determining the liability of related companies in a corporate group: -

(i) the degree to which the administration, management and finances of the companies are interlinked;

(ii) the conduct of the related company towards creditor of the insolvent company; and

(iii) whether creditors considered the two or more business entities as one economic unit and whether the actions of the related company have led to insolvency.

However, the UNCITRAL Legislative Guide Part III recommends limiting the use of substantive consolidation to two scenarios. First, if the court is satisfied that the assets or liabilities of the group members are intermingled in such a manner that it is difficult to identify the ownership of assets and liabilities without disproportionate expenses or delay. Second, if the court is satisfied that the entities of the same group are engaged in fraudulent activity, and if substantive consolidation is essential to rectify such activity. The MLEGI is silent on the issue of substantive consolidation.

The insolvency law in some jurisdictions allows courts to order substantive consolidation if certain pre-requisites are met. Jurisdictions such as Australia and New Zealand have enacted

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

provisions to guide courts on the circumstances in which consolidation may be ordered. Section 271(1)(b) of the Companies Act, 1992 of New Zealand allows the court to order that liquidation of companies of a group may be undertaken as if they are one entity if the court thinks it is 'just and equitable' to do so. The court will rely on the following factors to conclude whether passing such order is just and equitable: -

> "*(a) the extent to which any of the companies took part in the management of any of the other companies:*
>
> *(b) the conduct of any of the companies towards the creditors of any of the other companies:*
>
> *(c) the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies:*
>
> *(d) the extent to which the businesses of the companies have been combined:*
>
> *(e) such other matters as the court thinks fit."*[26]

Similarly, under Australian law, assets and liabilities of group companies may be pooled during liquidation proceedings. Such pooling takes places if the liquidator determines that it should take place and if unsecured creditors of each company approve this determination made by the liquidator.[27] Creditor consent for consolidation of assets and liabilities of a parent and its subsidiary is also required in Japan.[28]

In the US, substantive consolidation has borne out of practice. The Committee was informed, during its consultations with international experts, that consolidation orders in the US are only provided in rare circumstances but are becoming more common in recent years. Experts suggested that different courts in the US adopt different factors for determining if pooling is necessary and beneficial. Some common factors relied on by most courts are the extent to which group entities are inter-linked; whether creditors treated the group as a single entity; common directors and officers; intercorporate financing and guarantees; degree of difficulty in separating mingled assets and liabilities; failure to observe corporate formalities; etc. The effect of consolidation on creditors is also a factor that courts consider in the US. In *Auto-Train Corpn. Inc. v. Midland-Ross Corpn.*[29], the court laid down that to balance the interests of stakeholders "*a court must conduct a searching inquiry to ensure that consolidation yields benefits offsetting the harm it inflicts on objecting parties*." Further, courts in the US may order consolidation to different degrees based on the facts of the case and may not order complete consolidation in all instances.

In respect of the UK, experts consulted by the Committee discussed that courts are more reluctant to order consolidation due to the focus on entity separateness. However, courts

[26] Section 272(2) of the Companies Act 1992.

[27] *See* Sections 571 to 579L of the Corporations Act, 2001.

[28] Getting the Deal Through, *Japan – Insolvency and Restructuring* (2021).

[29] 810 F 2d 270, 276 (DC Cir 1987).

order asset pooling and adjustment of inter-company liabilities for companies belonging to the same group and substantive consolidation may also be effected under a scheme of arrangement.

The Committee took note of the above practices and discussed that different jurisdiction adopt different standards for the scenarios where consolidation may be appropriate and the suitable authority to make this decision. It is important to note that although the Code does not provide rules on substantive consolidation, Adjudicating Authorities have ordered consolidation in a number of instances. In *State Bank of India & Anr. v. Videocon Industries Ltd. & Ors.,*[30] the insolvency proceedings of 13 out of 15 companies belonging to the same group were ordered to be consolidated based on the following set of factors: -

(i) common control;
(ii) common directors;
(iii) common assets;
(iv) common liabilities;
(v) inter-dependence of the companies;
(vi) interlacing of finance;
(vii) pooling of resources;
(viii) co-existence for survival
(ix) intricate links between companies;
(x) intertwined accounts;
(xi) inter-looping of debts;
(xii) singleness of economic of units;
(xiii) common financial creditors.

Due to the lacuna in the Code, the Adjudicating Authority relied on jurisprudence in jurisdictions like the US and UK. A resolution plan has been approved for these companies by the National Company Law Tribunal (Mumbai) ("**NCLT**") vide a recent order dated 8 June 2021 (this has been stayed on appeal).[31] In another recent case, the NCLT Mumbai consolidated insolvency proceedings of various group companies of Lavasa Group on the basis that the insolvency of the subsidiaries depended on the outcome of the insolvency of the parent company.[32] Similarly, in the case of *Edelweiss Asset Reconstruction Company Limited v Sachet Infrastructure Pvt Ltd*[33], insolvencies of five group companies involved in developing a common township were consolidated by the National Company Law Appellate Tribunal ("**NCLAT**"), in the interests of homebuyers.

The Committee discussed that Adjudicating Authorities have been prompt in responding to economic realities of companies in insolvency proceedings even where the law does not so

[30] State Bank of India & Anr. v. Videocon Industries Ltd. & Ors, M.A. 1306/ 2018 & Ors. in CP No. 02/2018 & Ors- decision dated 8 August 2019.

[31] In the matter of Videocon Industries Ltd. And Ors., in NCLT Mumbai, dated 8 June 2021.

[32] Axis Bank Limited v Lavasa Corporation Limited, MA 3664 of 2019, available at http://www.lavasa.com/pdf/Lavasa-Corporation-Limited-MA-3664-2019-in-CP-1765-1757&574-2018-NCLT-ON-26.02.2020.pdf

[33] 2019 SCC OnLine NCLAT 592.

envisage, to enable value maximising outcomes for stakeholders. It is evident from the jurisprudence developing under the Code that Adjudicating Authorities have not just considered the economics of the companies undergoing insolvency but have also attempted to balance the interests of stakeholders and ensure that they are not prejudiced by consolidation. The Committee noted that designing rules for substantive consolidation may not be required when the jurisprudence in this regard is already evolving. A set of factors for determining the need for consolidation has been set out in case law and has been applied in subsequent cases. Even in other jurisdictions like the US and UK, the notion of substantive consolidation is created out of practice and not statute. This may be because the nature of substantive consolidation is such that the mix of factors and degree of consolidation applicable to a case will be significantly dependent on the facts and circumstances of the case and will vary from case-to-case. Thus, it may be suitable for the law on substantive consolidation to be guided by experience and learning from practice established under the Code in India. Moreover, the complexities involved in applying substantive consolidation require a deeper and thorough analysis to be translated into statutory norms.

Based on the above, the Committee agreed that it may be suitable to design legislative rules on substantive consolidation at a later stage. Such rules may be designed based on the learnings derived from practice and jurisprudence developed by Adjudicating Authorities under the Code. It was noted that NCLTs should continue to be prompt in considering if substantive consolidation is required following the practice set by the aforementioned decisions. However, NCLTs should be mindful that substantial consolidation is only a remedy for exceptional circumstances and should not be provided where effective outcomes can be achieved through procedural coordination.

Drafting Instructions (Box 2)

- Substantive consolidation involves the pooling of assets and liabilities of an insolvent group and is a rare remedy utilised in insolvency of group enterprises.
- Jurisprudence on substantive consolidation is already developing under the Code through case law.
- Provisions governing substantive consolidation may not be provided in the Code at present. The need for such provisions may be contemplated at a later stage, on the basis of practice and jurisprudence evolved in this regard.

4. Applicability of Draft Part ZA

4.1. Definition of 'Group'

The manner of defining the term 'group' will play a key role in determining the applicability of the group insolvency framework. Table 1 gives an overview of the definition of a group prescribed by the UNCITRAL Legislative Guide, MLEGI and the Working Group.

Table 1: Overview of the Definition of 'Group'

MLEGI	UNCITRAL Legislative Guide	Working Group
Applies to 'enterprise groups', which includes a broad set of organisations and not just corporations.	Applies to 'enterprise groups', which includes a broad set of organisations and not just corporations.	Applies to 'corporate groups', which only includes corporate debtors under the Code.
Enterprise group means two or more enterprises that are interconnected by control or significant ownership. Control is the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise.	Enterprise group means two or more enterprises that are interconnected by control or significant ownership. Control is the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise.	Corporate group includes holding, subsidiary and associate companies as defined in the Companies Act, 2013. The Adjudicating Authority may include other companies under this definition if they "*are so intrinsically linked as to form part of a 'group' in commercial understanding … as long as it can be demonstrated that this will result in maximisation of value of the insolvent company without destroying the value of the company being included, so that there is overall value maximization.*"[34]

Committee's Deliberations

During the course of consultations with international experts, the Committee noted a view that the law should allow for a wider group of companies to be part of a group insolvency, as opposed to a narrower sub-set of a group. The procedural coordination framework envisaged in a group insolvency is largely facilitative, aimed at reducing administrative costs and aiding in the development of a unified resolution plan involving multiple group members on a consensual basis. Importantly, procedural coordination mechanisms respect the separate legal personalities of each participating member of a group and do not affect their respective assets and liabilities. Given this, it was suggested before the Committee that there may not be any harm in adopting an inclusive and wide definition of the term 'corporate group' as has been recommended by the UNCITRAL Legislative Guide. Instead,

[34] Report of the Working Group, Page 28, 29.

such a definition would allow a wide range of corporate groups to avail the benefits of procedural coordination.

In light of the above, the Committee noted that the definition proposed by the Working Group would be applicable only to domestic groups as the provisions of the Companies Act, 2013 apply only to companies and bodies corporate incorporated in India.[35] On the other hand, the definitions recommended by the UNCITRAL Legislative Guide and the MLEGI, by virtue of being wider in nature, would equally apply to domestic and cross-border groups. Given this, the Committee discussed whether the Code should prescribe a single definition of 'group' for both the domestic and cross-border frameworks for group insolvency.

Pertinently, as noted above, the Committee recommends that the implementation of the group insolvency framework to multinational groups should be undertaken at a later stage. Thus, it is possible to presently recommend a definition of 'group', taking into consideration factors relevant only for the domestic group insolvency framework. However, if this approach is adopted, the definition of 'group' would require to be amended at the time of implementation of the cross-border framework for group insolvency. Alternatively, it may result in the development of two definitions of 'group'- one for the domestic framework and another for the cross-border framework. The former would not be ideal, as it may reduce clarity or cause confusion regarding the applicability of the domestic framework to existing commercial transactions. On the other hand, the latter may result in the same group of debtors being treated as a 'group' under one framework while being excluded from the respective definition under the other framework. The Committee concluded that having a consistent definition for both - the domestic and cross-border group insolvency frameworks - would ensure certainty. Given this, cross-border considerations should be kept in mind while defining a 'corporate debtor' even if the same is applicable only to domestic groups in the first phase of implementation.

Formal vs. functional approach

The Committee noted that the definition of the term 'group' may either be based on –

- a formal approach, such as the existence of shareholding or voting rights of a specified threshold; or
- a 'functional approach' by focusing on the existence of 'control', which may be direct or indirect, actual or potential.[36]

Both these approaches offer certain benefits. If the former is adopted, it would ensure *ex-ante* certainty, as it would be based on objective thresholds. The Committee noted that this

[35] Section 1 of the Companies Act, 2013 lays down the list of entities to which the provisions of the Companies Act, 2013 apply, which includes, companies incorporated under that Act, companies governed by special laws, bodies corporate, incorporated under any law in force in India, as notified by the Central Government etc.

[36] UNCITRAL Legislative Guide, Ch. 1, Para 28

approach was advocated by the Working Group.[37] Some members of the Committee were of the opinion that a similar approach should be adopted by this Committee as well, as the concepts of 'holding company', 'subsidiary' and 'associate company' are well established in practice and will ensure that creditors will have prior knowledge, at the time of sanctioning a loan, regarding whether they are interacting with a member of a group.

On the other hand, the latter approach, namely a functional approach, provides a broader and inclusive definition, which has the potential of ensuring that a wide variety of enterprise groups fall within its scope. In this regard, the Committee noted that, globally, the organizational structures of groups vary to a great extent. Groups may be structured on the basis of equity, wherein a group of entities are linked to each other by virtue of a common shareholder or set of shareholders (like a family). The simplest form of equity-based groups would involve a pyramidal structure, comprising one parent company and multiple wholly-owned subsidiaries. There may be other more complicated structures as well, comprising of multiple subsidiaries and sub-subsidiaries, involving "*interlocking webs of majority and minority holdings*".[38] Apart from equity, control within a group may be established by contractual arrangements and interlocking directorships, as well.[39] Entities may also be linked to each other by way of joint ventures, strategic alliances, and other forms of contractual arrangements, including "*franchisees, distributors, licensees, and other independent contractors*."[40]

Considering the wide variety of forms in which groups may exist in practice, the Committee is of the view that a prescriptive definition that is only based on objective thresholds, while ensuring certainty, may fail to include all kinds of enterprise groups.[41] Such a definition may prevent courts from recognising the economic realities of such groups, and thus prove to be inadequate.[42]The Committee also noted that, insofar as procedural coordination is concerned, there is no potential harm in allowing a wide range of entities to be included within the definition of a 'group', as the same is a voluntary and enabling mechanism, aimed at reducing administrative costs and increasing efficiency, without affecting the assets and liabilities of each participating member.[43] Given this, the **Committee recommends that the Code should provide an inclusive definition of 'group' which may be based on the existence of control or significant ownership, similar to the ones**

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[37] *See* Report of the Working Group on Group Insolvency, (September 2019), p. 29 <https://www.ibbi.gov.in/uploads/resources/d2b41342411e65d9558a8c0d8bb6c666.pdf>

[38] Tom Hadden, Regulation of Corporate Groups in Australia, (1992) UNSW Law Journal 15(1), 61-85 <http://classic.austlii.edu.au/au/journals/UNSWLawJl/1992/4.pdf>

[39] Tom Hadden, Regulation of Corporate Groups in Australia, (1992) UNSW Law Journal 15(1), 61-85 <http://classic.austlii.edu.au/au/journals/UNSWLawJl/1992/4.pdf>

[40] Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived,* (2012) 42 Seton Hall L Rev 879, <https://scholarship.shu.edu/shlr/vol42/iss3/2>

[41] *See* Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP, 2009), 29,30.

[42] *Ibid.*

[43] It may be noted that during the course of consultations, a few experts had pointed out that an inclusive and broad-based definition may not be adopted while adopting stringent measures against groups, such as substantive consolidation and avoidance of intra-group transactions. However, since the Committee has not recommended implementing such measures, this has not been accounted for in the discussion in the Report in this regard.

recommended in the UNCITRAL Legislative Guide and the MLEGI. The Committee also discussed that the terms 'control' and 'significant ownership' should be defined in the Code to ensure that there is sufficient clarity in the applicability of the group insolvency framework.

In respect of the term 'control', it was noted that this term has been defined in various legislations while defining the meaning of a 'group'. For instance, different definitions of 'control' are provided in the Companies Act, 2013, the Competition Act, 2002, the SEBI Takeover Regulations, etc. A definition for control has also been provided in the MLEGI. On studying these definitions, it was felt that there is benefit in utilising the jurisprudence under the Companies Act in this regard as it already applies to all companies in India. **The Committee agreed that the definition of 'control' under the Companies Act, 2013 may be inserted in the Code. Suitable modifications may be made to this definition to account for control in limited liability partnerships.**

In respect of 'significant ownership', the Committee noted that this term has not been defined in other Indian laws for the purposes of defining the meaning of a 'group'. However, the ability to exercise 26% or more of voting power by one company in another is usually considered as a sufficient threshold for considering them to be part of a group. For instance, a 26% ownership criterion is used in the definitions of 'group' in Section 5 of the Competition Act, 2002, in Article 2.1.25 of FDI Policy 2020, etc. Given this, **the Committee agreed that 'significant ownership' may be defined as the ability to exercise 26% or more voting power.** The Committee also discussed that the definitions of control and significant ownership should be inclusive so as to provide flexibility to Adjudicating Authorities to apply the definition broadly.

The applicability of a principle-based definition, as recommended above, would be subject to factual determination by courts, on a case-to-case basis. While this will ensure that Adjudicating Authorities can recognize a wide variety of groups, it may also, at the initial stage, result in lack of clarity regarding its scope, owing to conflicting judicial interpretations. To prevent this, and to provide sufficient guidance to Adjudicating Authorities, the **Committee recommends that an Explanation may be provided to this definition, to clarify that holding companies, subsidiaries and associate companies, as defined under the Companies Act, 2013, would fall under the definition of a 'group'**.

Inclusion of all 'corporate debtors'

The Committee noted that groups typically involve a wide variety of entities, in addition to companies.[44] However, the Working Group had recommended that the term 'corporate group' should only apply to companies and "*not all corporate debtors*", as it was of the view that "*more evidence may be required to build a case that group structures routinely*

[44] Virginia Harper Ho, Theories of Corporate Groups: Corporate Identity Reconceived, (2012) 42 Seton Hall L Rev 879, <https://scholarship.shu.edu/shlr/vol42/iss3/2>

include other forms of entities such as partnerships and trusts."[45] In this regard, the Committee noted that the term 'corporate debtor' has been defined as-

> *"a corporate person who owes a debt to any person*"[46] and the term 'corporate person' has been defined as "*a **company** as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a **limited liability partnership**, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or **any other person incorporated with limited liability** under any law for the time being in force but shall not include any financial service provider*".[47] (Emphasis Supplied)

As Part II of the Code applies "*to matters relating to the insolvency and liquidation of corporate debtors*"[48], the provisions relating to the corporate insolvency resolution process ("**CIRP**") and liquidation process apply equally to all kinds of entities covered under the definition of 'corporate debtor'. As the group insolvency framework is intended to apply to insolvency proceedings provided under Part II of the Code, the Committee was of the view that the **term 'group' should not be restricted solely to companies but apply to all kinds of corporate debtors, as defined under Section 3(8) of the Code.**

However, the Committee did not envisage inclusion of financial service providers within this framework and considered it suitable to limit the applicability of the present framework to corporate debtors under Part II of the Code, excluding financial service providers notified under Section 227.

Drafting Instructions (Box 3)

- A broad and inclusive definition of 'group' should be provided in the Code so as to include a large number of corporate debtors within the ambit of the group insolvency framework.
- The definition of 'group' may be based on the criteria of control and significant ownership.
- This definition should be applicable to all entities that fall within the definition of a 'corporate debtor' under the Code, i.e., companies and LLPs. The group insolvency framework may not apply to financial service providers notified under Section 227 of the Code.

[45] Report of the Working Group on Group Insolvency, (September 2019), p. 30 <https://www.ibbi.gov.in/uploads/resources/d2b41342411e65d9558a8c0d8bb6c666.pdf>

[46] Code, Section 3(8).

[47] Code, Section 3(7).

[48] Code, Section 4.

4.2. Solvent entities

The applicability of the Code is limited to debtors who have committed a default and insolvency proceedings cannot be commenced against debtors who have not committed a default. This is evident from the text of Section 4 which provides that provisions of Part II of the Code only apply to corporate debtors who have committed default of the amount prescribed therein.

The MLEGI does not specifically discuss the issue of inclusion of a solvent group member within frameworks for procedural coordination. Although it allows solvent group members to voluntarily participate in the insolvency proceedings of a group member, such participation is limited to any aid such member wants to voluntarily offer.[49] Further, Article 1 of the MLEGI lays down its scope and provides that it "*applies to enterprise groups where insolvency proceedings have commenced for one or more of its members, and addresses the conduct and administration of those insolvency proceedings and cross-border cooperation between those insolvency proceedings*."[50] This indicates that the MLEGI comes into operation only when insolvency proceedings are initiated against one or more group members, and its scope is limited to addressing such insolvency proceedings.

The Committee took note of the above. During consultations with international experts on this subject, it was suggested that group insolvency frameworks are typically limited to entities of a group that are already insolvent and sometimes entities that may become insolvent soon. In the UK, for example, courts are generally reluctant to include a solvent entity in administration proceedings unless the entity is likely to be insolvent or such inclusion would lead to better returns for the creditors. In respect of the MLEGI, experts consulted by the Committee noted that the MLEGI permits voluntary participation of solvent entities in the insolvency proceedings of a group enterprise if it leads to benefits for the enterprise and leads to better outcomes. However, in line with the UNCITRAL Legislative Guide, it assumes that insolvency proceedings can only be opened for entities that meet the commencement standard and not for solvent entities of the group.

On the basis of the above, the Committee discussed if the group insolvency framework should apply to solvent entities. It noted that the scope of the Code is limited to scenarios of insolvency and liquidation and does not extend to pre-insolvency scenarios. Therefore, applying a group insolvency framework under the Code to pre-insolvency scenarios may not be suitable. Further, the Code adopts a simple default test for triggering insolvency, which is meant to simplify and enable timely initiation of insolvency proceedings. Since the Code is built with early detection of insolvency as an objective, creditors can easily initiate insolvency. Thus, judicial determination of whether a connected entity will become insolvent in the near future may be time-consuming and unnecessary. **Given this, the Committee agreed that the framework for group insolvency shall not apply to solvent entities in a group.**

[49] MLEGI, Article 18.

[50] MLEGI, Article 1.

Drafting Instructions (Box 4)

- The group insolvency framework under the Code should only apply to corporate debtors in respect of whom a corporate insolvency resolution process or liquidation process is ongoing. The law shall not apply to solvent members of the group.

5. Procedural Coordination

Procedural coordination is a way of coordinating concurrent insolvency proceedings of entities belonging to a group, by which the *procedures* of such proceedings are synchronised. This does not entail pooling of the assets of group entities, and therefore, does not alter substantive rights or liabilities of parties. Instead, such coordination is limited to synchronising various aspects of the manner in which the insolvency proceedings of group entities are administered.[51] Thus, the individual group entities retain their separate identities, their separate insolvency estates, and their separate bodies of creditors even when their insolvency proceedings are being procedurally coordinated.[52]

Due to the varying nature of group structures and the need for coordination in their insolvencies, there is no single blueprint for the manner in which procedural coordination would be applied in every case. The popular approach that is followed by most jurisdictions, in this regard, is to create an enabling framework that permits numerous ways of coordinating insolvency proceedings of group entities. For instance, the insolvency law may permit that applications for initiation of insolvency against group members be filed jointly; the insolvency proceedings be conducted in a common forum; a common insolvency practitioner be appointed in such proceedings; notices of the proceedings be issued jointly; etc. Parties are then free to choose the appropriate coordination mechanism that suits the practical realities of their group structure, subject to supervision of courts.

The key benefits that procedural coordination mechanisms provide are reducing administrative costs of conducting the insolvency proceedings, preventing duplication of efforts of stakeholders, and enabling information sharing between creditors, insolvency professionals and courts.[53] This may further aid in availing better value cumulatively from the insolvency proceedings of the group entities.[54] In some cases, parties and courts may also come to the conclusion that procedural coordination is not necessary. For example, when there are no significant interlinkages between group entities that are undergoing insolvency proceedings, coordinating such proceedings may lead to no substantial benefit.

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

[52] *Ibid.*

[53] Report of the Working Group, Page 19-23.

[54] *Ibid.*

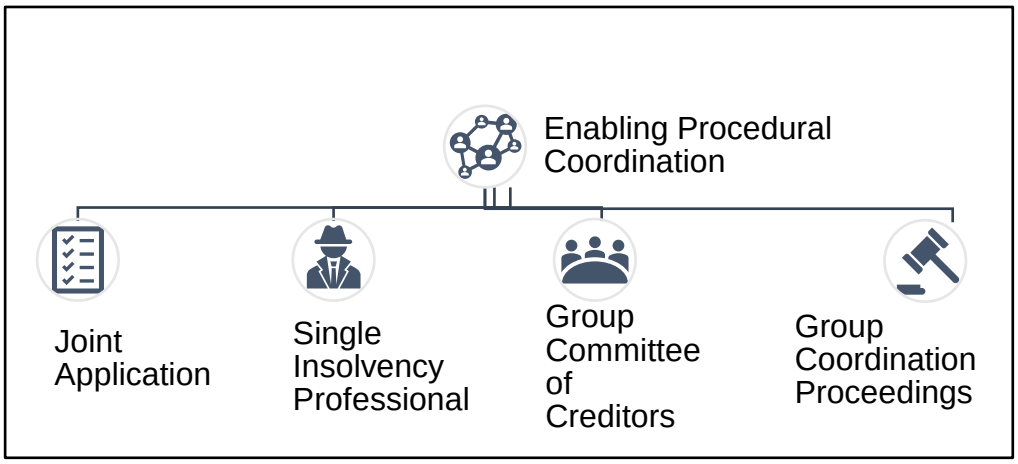

Figure 1: Enabling Procedural Coordination Mechanisms

Based on this approach, the Working Group recommended that a flexible and enabling framework of procedural coordination mechanisms may be provided in the Code, and noted that -

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

i. Joint application
ii. Communication, cooperation and information sharing
iii. Single insolvency professional and single Adjudicating Authority
iv. Creation of a group creditors' committee, and
v. Group coordination proceedings.

...b. While all other elements of procedural co-ordination may be voluntary, cooperation, communication and information sharing among insolvency professionals, CoC and Adjudicating Authorities may be mandatory for companies that have been admitted into CIRP."[55]

The Committee reviewed the above recommendations of the Working Group in respect of the approach to providing procedural coordination mechanisms under the Code. **It agreed that, as suggested by the Working Group, the framework for procedural coordination of insolvency proceedings of group companies under the Code should be enabling in nature and flexible enough to be adopted suitably to different kinds of cases. The Committee also agreed that this framework should not be too prescriptive, and should allow parties to negotiate among themselves to arrive at the most commercially viable manner of coordinating the proceedings.**

[55] Report of the Working Group, Page 9-10.

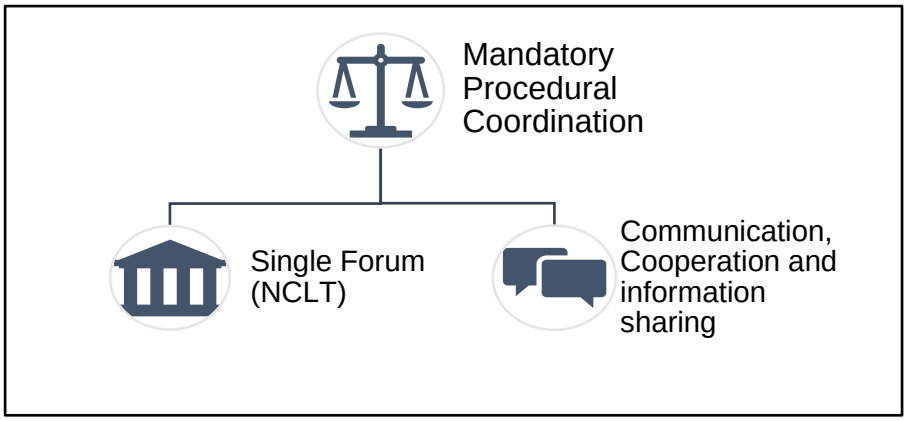

Figure 2: Mandatory Procedural Coordination Mechanisms

The Committee also discussed that the Working Group had rightly identified the appropriate mechanisms for effectively coordinating the administration of insolvency resolution and liquidation proceedings under the Code. **Accordingly, the Committee agreed that the following procedural coordination mechanisms should be available to parties in respect of the corporate insolvency resolution and liquidation proceedings of corporate debtors belonging to the same group:**

(a) filing of joint application for initiation of the corporate insolvency resolution process;
(b) conducting the proceedings in a common forum, i.e., having a single Adjudicating Authority;
(c) appointing a common insolvency professional;
(d) creating a group committee of creditors;
(e) undertaking communication, cooperation and information sharing; and
(f) holding group coordination proceedings.

Further, the Committee decided that whereas the mechanisms in points (a), (c)-(d) and (f) should be enabling and parties may voluntarily choose to opt for them, the mechanisms in points (b) and (e) should be mandatory. This has been depicted in figures 1 and 2 above, and elaborated on in the following paragraphs.

5.1. Joint application

One of the means of ensuring effective cooperation and coordination of insolvency proceedings of multiple group members is to allow filing of a joint or single application for commencing such proceedings. In this regard, the UNCITRAL Legislative Guide recommends that filing of joint applications should be permitted under the insolvency law, provided that each of the group members "*satisfies the applicable commencement standard*".[56] According to the UNCITRAL Legislative Guide, a joint application may be

[56] UNCITRAL Legislative Guide, Recommendation 199.

filed by two or more group members that meet the applicable commencement standard, or by a creditor of two or more such group members.[57]

Similarly, the Working Group had recommended that a joint application on behalf of multiple group members should be permitted and that such application may be filed by "*financial creditors, operational creditors or the group companies themselves*".[58] Further, in line with the recommendations of the UNCITRAL Legislative Guide, the Working Group had clarified that a joint application should only be filed in respect of group companies that have committed a default as per Section 4 of the Code.[59] Thus, as a joint application is essentially a common application for initiating CIRP against two or more corporate debtors, the requirement for filing a stand-alone application against a single corporate debtor, namely the existence of default, should also apply for filing a joint application.

During the course of consultations with international experts, the Committee was informed that in the US, a joint application, involving all the members of a corporate group, is typically filed for commencing bankruptcy proceedings against a corporate group. Similarly, the Committee noted that in the UK, an application to commence an administration proceeding against a principal member of a group is typically accompanied by simultaneous applications on behalf of the other members of the same group. Such simultaneous applications are typically filed before the same court and are represented by the same counsel as well.

The Committee noted that there are several advantages in allowing filing of joint applications. It may help in improving efficiency and reducing costs by allowing courts to take a comprehensive and coordinated assessment regarding whether CIRP should be commenced against all the corporate debtors in respect of whom a joint application is filed.[60] Further, it may also establish a common date of commencement for multiple group members and help the court to gather information regarding the entire group which may also help in determining whether insolvency proceedings ought to be commenced against the group members involved.[61] However, the Committee noted that the UNCITRAL Legislative Guide distinguishes a joint application from other procedural coordination mechanisms: while a joint application helps in coordinating commencement of multiple proceedings and establishing common timelines, it is not intended to pre-determine whether and to what extent such proceedings should be coordinated.[62] A joint application may,

[57] UNCITRAL Legislative Guide, Recommendation 200.

[58] Report of the Working Group, Page 42.

[59] Report of the Working Group, Page 42.

[60] UNCITRAL Legislative Guide, Chapter 2, Para 8.

[61] UNCITRAL Legislative Guide, Purpose of Legislative Provisions to Recommendations 199-201; UNCITRAL Legislative Guide, Chapter 2, Para 8.

[62] UNCITRAL Legislative Guide, Chapter 2, Para 9

nevertheless, aid the court in determining whether procedural coordination would be appropriate in a given case.[63]

Given the advantages of enabling joint applications, and the prevalence of the same in other jurisdictions, the Committee agreed that **the Code should permit filing of joint applications on behalf of multiple corporate debtors belonging to the same group, that have committed a default.** In other words, joint applications may only be filed against corporate debtors belonging to the same group if each such application meets the requirements of Sections 7, 9 or 10, as may be applicable.

However, the bar against initiation of insolvency proceedings against solvent group members should not preclude such group members from voluntarily contributing towards the resolution of insolvency of other group members. Thus, if a solvent group member wishes to participate in the insolvency resolution of other group members, for helping in the resolution of such group members or to protect its own interests, such voluntary participation should not be restricted. For example, if the liquidation of any one group member may adversely impact the interests of other members of the same group, solvent group members should not be prevented from submitting resolution plans or extending interim finance, to other group members.[64] The Committee noted that, internationally, such participation by solvent group members, on a voluntary basis, is "*in fact, not unusual in practice*".[65] However, as a solvent group member will not be subject to any insolvency proceeding, the decision to participate in the resolution of insolvency of other group members, would be an ordinary business decision of such group member.

The Committee noted that, in some cases, different Adjudicating Authorities may have jurisdiction over the registered offices of different group members, which may preclude the filing of a joint-application. To remove this difficulty, the **Committee agreed that the Code should enable filing of a joint-application on behalf of two or more group members, before any Adjudicating Authority which has jurisdiction over any one such group member**.

In the context of joint applications, the Committee considered whether the Code should prescribe filing of a combined application form or allow simultaneous filing of separate applications. In this regard, the Committee noted that if the latter approach is adopted, it would allow for the individual group members to separately file for withdrawal under Section 12A, independently appoint or replace resolution professionals, etc. Effectively, this would allow the insolvency proceedings to be conducted separately, with the option of subsequent procedural coordination. Given this, **the Committee agreed that while the Code should allow for filing of joint applications on behalf of multiple group members, it should be in the form of separate applications being filed simultaneously on behalf of each such group member.** Such simultaneous applications should be

[63] UNCITRAL Legislative Guide, Purpose of Legislative Provisions to Recommendations 199-201.

[64] Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP, 2009), page 156

[65] UNCITRAL Legislative Guide, Chapter 2, Para 152

accompanied with a common form, which may be prescribed in subordinate legislation. This form should provide relevant details of the financial and operational linkages between the corporate debtors in respect of whom insolvency proceedings are proposed to be initiated. This will enable the Adjudicating Authority to determine whether the such corporate debtors form part of the same 'group'. It will also facilitate a common listing of cases and a coordinated admission process.

Drafting Instructions (Box 5)

- Filing of joint applications for initiation of corporate insolvency resolution proceedings against multiple corporate debtors belonging to the same group may be permitted.
- Such applications may be filed with an Adjudicating Authority that has jurisdiction over any one of the corporate debtors in respect of whom such joint application is being filed.
- Although filing jointly may be permitted, the application form for each corporate debtor should be separate, but accompanied by a common form.

5.2. Common Forum

Although the question of jurisdiction is often considered relevant only in cross-border cases, conflicts over jurisdiction may also arise domestically. Multiple domestic courts may potentially have jurisdiction over different group companies if such companies are located in different places of the country.[66] The question of allowing only a single authority to have jurisdiction over insolvency proceedings of group entities may arise at two stages- *first*, at the stage of filing application for commencement of insolvency proceedings; and *second*, at the time of administration of proceedings.

5.2.1. Forum for filing of application for commencement of CIRP

The Working Group recognised that having a common forum for insolvency proceedings of corporate debtors belonging to the same group would make coordinating such proceedings more efficient. For the purposes of filing of applications for initiation of CIRP, it recommended that such applications may be filed with the Adjudicating Authority having territorial jurisdiction of the respective corporate debtor as per Section 60 of the Code. It also suggested that a joint application for initiation of CIRP in respect of multiple corporate debtors (as recommended in para 5.1 above), may be filed in any of the Adjudicating Authorities having such territorial jurisdiction. For instance, where company X is registered in Delhi, company Y is registered in Mumbai and company Z is registered in Ahmedabad, the respective NCLTs located in Delhi, Mumbai and Ahmedabad will have jurisdiction over the CIRP and liquidation process of X, Y and Z, respectively.[67] Consequently, any applications for initiating a CIRP in respect of one of these companies will be filed in the

[66] UNCITRAL Legislative Guide, Chapter II Para 18-19.

[67] As per Section 60 of the Code

NCLT that has jurisdiction over such company. If a joint application is to be filed for initiating a CIRP in respect of companies X, Y and Z, it may be filed in either Delhi, Mumbai or Ahmedabad. **The Committee agreed with this and discussed that prescriptive restrictions on the Adjudicating Authority for filing joint applications may unnecessarily complicate the process.**

5.2.2. Forum for conduct of CIRP and liquidation proceedings

Having a common forum for conducting the insolvency processes of all group companies may make it much easier to coordinate concurrent insolvency proceedings of such companies. It would also reduce the costs of communication and information-sharing with other courts, ensure consistency in treatment of all group members and provide certainty to stakeholders. It is perhaps due to such advantages that applications in respect of various group companies are usually filed and administered in a single forum in jurisdictions like the US[68] and Germany[69]. Despite this, the MLEGI does not provide guidance on whether a common domestic forum should administer the insolvency proceedings of group members. Instead, it provides mechanisms for cooperation and coordination of proceedings by courts and insolvency professionals that may be applicable in both domestic and cross border scenarios. These provisions allow courts and insolvency professionals to freely communicate with each other and share information necessary to coordinate the insolvency proceedings.

A bare reading of these provisions of the MLEGI may suggest that it does not consider that a common domestic forum would be helpful in coordination of the insolvency proceedings of group entities. However, this does not seem to have been the intention behind the MLEGI. The Guide to Enactment to the MLEGI clarifies that the recommendations contained in the MLEGI build on those provided in the UNCITRAL Legislative Guide. Further, international experts have suggested that the UNCITRAL Legislative Guide and the MLEGI should be read together to design a comprehensive set of mechanisms for coordination of insolvency proceedings of group entities.

Thus, the guidance provided in the UNCITRAL Legislative Guide in this regard is pertinent. The UNCITRAL Legislative Guide recommends that the law should clearly state which court has competent jurisdiction to decide whether procedural coordination should take place.[70] It acknowledges that this is largely dependent on domestic procedural law and discusses two possibilities.[71] First, where domestic procedural law allows proceedings in different courts to be consolidated or transferred to a single court. And second, where proceedings are not consolidated or transferred to a single court and the courts involved

[68] Based on consultations with experts.

[69] Section 3, German legislation, translated by Schultze & Braun GmbH & Co. KG, Insolvency and Restructuring in Germany – Yearbook 2019, available at <https://www.schultze-braun.de/fileadmin/de/Fachbuecher/Insolvenzjahrbuecher/Insolvenzjahrbuch-2019/Insolvency_and_Restructuring_2019_rz.pdf?_=1547820263>

[70] UNCITRAL Legislative Guide, Chapter 2 Para 31-32.

[71] *Ibid.*

engage in communication to come up with coordinated responses to the question of procedural coordination.

In this regard, the Working Group recommended that generally, a single Adjudicating Authority should administer the CIRP and liquidation proceedings of multiple group members.[72] It suggested that the NCLT that is the first to admit an application for initiation of a CIRP in respect of a corporate debtor may be best suited to be the Adjudicating Authority of other corporate debtors belonging to the same group. **The Committee agrees that the insolvency proceedings of multiple group members should be administered in the same forum, and the NCLT that is the first to admit a CIRP application in respect of a corporate debtor may be suitable to be Adjudicating Authority for other group members.**

The Committee discussed that making the transfer of proceedings to the same forum subject to exceptions may lead to time-consuming litigation and increase pendency of cases with the NCLTs. It also noted that a subjective determination of the need to transfer proceedings to a single forum may not be practically efficient. Firstly, if multiple NCLTs have jurisdiction over different proceedings of corporate debtors belonging to the same group, they may make their own assessment of the need to transfer such proceedings and may arrive at varying conclusions. This may cause confusion and lead to unpredictable outcomes in different insolvency cases. Second, an efficient system for communication between NCLTs may take time to develop and will be dependent on available infrastructure. Since building such practices take time in most jurisdictions, it may be more suitable to have a common forum for proceedings that need to be coordinated instead. Moreover, even presently, the Code provides a common forum for certain proceedings that could require coordination. For instance, Section 60(2) and (3) of the Code provide a mechanism to have a common forum for concurrent proceedings in respect of a corporate debtor, its corporate guarantors, and its personal guarantors.

Emulating this, the Committee discussed that mandating transfer of CIRP and liquidation proceedings of corporate debtors that belong to the same group in a common forum may be more efficient. **It therefore, recommends that all CIRP and liquidation proceedings in respect of corporate debtors belonging to the same group should be filed or transferred to the NCLT that is the first to admit a CIRP of a corporate debtor belonging to such group. It also suggests that objections to such transfer should be entertained only in exceptional circumstances, and such objections should be decided on by the NCLT that is the first to admit the CIRP. Further, ancillary proceedings (like avoidance action proceedings, group coordination proceedings), if any, should also be filed in such NCLT.**

[72] Report of the Working Group, Page 43.

Drafting Instructions (Box 6)

- Where a joint application for initiating a corporate insolvency resolution process is filed, it may be filed with any NCLT that has territorial jurisdiction over one of the corporate debtors in respect of whom the application is being made.
- All proceedings related to corporate debtors belonging to a group may take place under the same Adjudicating Authority.
- To give this effect, all pending applications and proceedings under the Code in respect of a group member should be transferred to the NCLT that is the first to admit an application for triggering an insolvency resolution process in respect of any corporate debtor belong to the group. All new applications in respect of any group member should also be filed in such NCLT.

5.3. Single Insolvency Professional

5.3.1. Appointing a single or common insolvency professional

The Committee noted that appointing a single or same insolvency professional in the insolvency proceedings of multiple group members may help in coordinating the respective insolvency proceedings, and aid in reducing costs and delays and in sharing of necessary information.[73] The UNCITRAL Legislative Guide recommends that the insolvency law should enable appointment of a single or the same insolvency representative, when it is in "*the best interests of the administration of the insolvency proceedings*" of the group members.[74] The UNCITRAL Legislative Guide notes that the decision to appoint a common insolvency representative should be dependent on the nature of the group, including the degree of integration and whether the proposed insolvency representative has relevant experience and knowledge necessary for conducting multiple proceedings.[75] In line with the recommendations of the UNCITRAL Legislative Guide, the MLEGI enables courts to appoint and recognise "*a single or the same insolvency representative*" with respect to multiple group insolvency proceedings.[76]

The Working Group had recommended that a single insolvency professional should be appointed for all the companies in a group that are undergoing insolvency proceedings, except "*where the appointment of a single insolvency professional would result in potential conflicts of interest or the same insolvency professional would not have sufficient resources to carry out her duties in respect of multiple appointments.*" [77]

[73] UNCITRAL Legislative Guide, Ch. II, para 142.

[74] UNCITRAL Legislative Guide, Recommendation 232.

[75] UNCITRAL Legislative Guide, Ch. II, para 143.

[76] MLEGI, Article 17.

[77] Report of the Working Group, Page 43.

During the course of consultations with international experts, the Committee noted that the courts in the UK, typically appoint a common administrator for every group member undergoing administration and an entity-specific administrator for each individual member. Each administrator is empowered to act independently of the other administrators, which enables the administrators of different group members to negotiate and arrive at settlements and compromises with respect to intra-group disputes. The Committee also noted that in the US, courts generally appoint a common trustee to administer bankruptcy proceedings (that are jointly administered). Separate trustees are rarely appointed for bankruptcy proceedings of group members; however, courts may appoint additional trustees to administer the proceedings in the event of a conflict of interest.

In light of the above, the Committee discussed whether the Code should allow a single insolvency professional to be appointed for multiple group members undergoing insolvency proceedings. In this regard, the Committee noted that in certain cases, the Adjudicating Authority has appointed a common resolution professional for multiple corporate debtors belonging to the same group. For example, in *Edelweiss Asset Reconstruction Company Limited v Sachet Infrastructure Pvt. Ltd*, the NCLAT had, while ordering for simultaneous admission of CIRP against five corporate debtors belonging to the same group, required for the appointment of a 'common resolution professional' for such corporate debtors.[78]

The Committee noted that in certain cases, appointing a common insolvency professional can result in significant reduction in costs and enable a speedy closure of proceedings, while in other cases, such appointment may be value-destructive, either due to the existence of potential conflicts of interest or for the lack of necessary expertise or resources to manage multiple insolvency proceedings. Given this, **the Committee agrees that the Code should not mandate appointment of a common insolvency professional for every corporate debtor belonging to the same group. With respect to corporate debtors undergoing CIRP, the respective CoCs may decide whether to appoint a common resolution professional which may be approved by the Adjudicating Authority, as per existing procedure. With respect to corporate debtors undergoing liquidation proceedings, the Adjudicating Authority may appoint a common liquidator, if the same would aid in achieving value-maximising returns for creditors. Given that the provisions of the Code do not prohibit the appointment of a common insolvency professional for multiple group entities, the Committee discussed that no amendment would be necessary to enable this.**

However, the Committee noted that under Regulation 3 of the CIRP Regulations, a resolution professional is required, *inter alia*, to be eligible to be appointed as an independent director of the corporate debtor. Given that this may pose a hurdle to having a common resolution professional for multiple group corporate debtors, the **Committee agreed that the CIRP Regulations should provide an express exception to allow a resolution professional to be appointed in the CIRP of multiple group corporate**

[78] *Edelweiss Asset Reconstruction Company Limited v Sachet Infrastructure Pvt. Ltd*., Company Appeal (AT) (Insolvency) No. 377 of 2019; para 42. Decision date- 20.09.2019.

debtors, even if she is not eligible to be appointed as an independent director of each of such debtors.

Conflict of interest

Appointing a common insolvency professional for multiple group members, may result in conflicts of interest.[79] These would typically arise out of intra-group claims, avoidance actions against intra-group transactions, and interim-finance provided by group members.[80] Recognising the potential for conflicts of interest among group members, the UNCITRAL Legislative Guide recommends the obligation of sharing information among members of the same group should be subject to appropriate arrangements "*to protect confidential information*".[81] However, this safeguard may be inadequate, in cases where the same insolvency professional is appointed for multiple group members. A common insolvency professional would have access to confidential and financial information of all the debtors she is administering the insolvency proceedings of, which may result in the insolvency professional being in possession of information that may compel her to proceed against another group member she is representing.[82] More pertinently, it would result in the same office-holder representing two opposing parties, such as, acting on behalf of both the creditor and the debtor, or representing both the claimant and respondent. In the context of avoidable transactions, having a common insolvency professional may pose hardships as well, when such transactions involve members of the same group. This may be especially challenging, as determining the fairness and legitimacy of intra-group transactions is particularly difficult and often subject to contentious litigation.[83]

The potential consequence of conflicts of interest may be severe, in light of the wide powers and functions reposed with an insolvency professional during a CIRP or a liquidation process, which includes the duty of receiving and collating claims against a corporate debtor, managing its operations, filing for avoidance of preferential, undervalued and extortionate transactions etc. Given this, the UNCITRAL Legislative Guide recommends that the insolvency law should specify adequate measures for addressing conflicts of interest arising out of appointment of the same or single insolvency representative, which may include providing for appointment of one or more additional insolvency representatives, requiring the common insolvency representative to provide an undertaking, and requiring her to seek necessary directions from the court, for resolving such conflicts.[84] Thus, for example, courts may be enabled to appoint additional or special insolvency professionals, specifically for resolving intra-group disputes, which would ensure that a single insolvency professional is not expected to represent two conflicting parties to a dispute. Alternatively,

[79] UNCITRAL Legislative Guide, Ch. II, para 144

[80] Ilya Kokorin, *Conflicts of interest, intra-group financing and procedural coordination of group insolvencies*, (2020) International Insolvency Review, 32–60, 38 https://doi. org/10.1002/iir.1370

[81] *See* UNCITRAL Legislative Guide, Recommendation 236.

[82] Ilya Kokorin, *Conflicts of interest, intra-group financing and procedural coordination of group insolvencies*, (2020) International Insolvency Review, 32–60, 47 https://doi. org/10.1002/iir.1370

[83] Jens Dammann, "Related Party Transactions and Intragroup Transactions," in Luca Enriques and Tobias Tröger (eds), *The Law and Finance of Related Party Transactions* (2019) Cambridge University Press, 219.

[84] UNCITRAL Legislative Guide, Recommendation 233; para 144, 77.

the common insolvency professional may be required to seek prior authorisation of the court, while dealing with intra-group transactions.

The Committee noted that insolvency professionals in India are required to act with objectivity "*without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not*".[85] Further, an insolvency professional is required to make disclosures to stakeholders if any conflict of interest arises during an assignment.[86] Given this, the Committee is of the view that the obligation of an insolvency professional to conduct insolvency proceedings under the Code with objectivity and without any conflict of interest, should extend while administering insolvency proceedings of group debtors as well. Ordinarily, an insolvency professional should make an assessment to ensure the absence of any conflict of interest, before agreeing to be appointed in the insolvency proceedings of group members. However, the nature of conflict of interest existing within a group may not be limited to conflicts of personal nature: as noted above, in the context of intra-group disputes and transactions, a common insolvency professional may find herself being required to represent both the claimant and the respondent, or the guarantor and the debtor.[87] In such cases of impersonal conflicts of interest, the insolvency professional should, at the time of accepting such an appointment, duly disclose the nature and extent of the conflict, so as to inform the decisions of the respective committees of creditors regarding appointing a common insolvency professional. Additionally, in the event that any instance of conflict of interest is discovered during the course of an insolvency proceeding, the insolvency professional should ordinarily disclose the existence of the same—as per existing requirements—and seek assistance of the respective CoCs regarding their resolution.

Ordinarily, the afore-mentioned measures should ensure that conflicts of interests are either prevented—by way of prior disclosure by the insolvency professional—or duly addressed—either by the insolvency professional herself, with the assistance received from the respective CoCs, or by the CoC of an affected group member, who may choose to replace the common insolvency professional with another insolvency professional. However, in exceptional cases these measures may be found to be inadequate, for dealing with conflicts of interest. **Given this, the Committee recommends that if the insolvency professional feels that, during the course of administering parallel insolvency proceedings, she is unable to resolve the conflicts of interests, she should approach the Adjudicating Authority for necessary directions. However, there need not be a specific provision to provide for this, as the Adjudicating Authority would be best suited to provide adequate relief on a case-to-case basis.** This will, for example, enable the insolvency professional to file an application seeking appointment of an additional or special insolvency professional, specifically for dealing with intra-group transactions.

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[85] Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, Code of Conduct for Insolvency Professionals.

[86] *Ibid.*

[87] Ilya Kokorin, *Conflicts of interest, intra-group financing and procedural coordination of group insolvencies*, (2020) International Insolvency Review, 32–60 <https://doi. org/10.1002/iir.1370>

Drafting Instructions (Box 7)

- A common insolvency professional may be appointed as the resolution professional or liquidator of corporate debtors that belong to the same group. Specific provisions to enable this may not be required in the Code.
- Restrictions on eligibility requirements for resolution professionals under the CIRP Regulations may be amended accordingly.
- An insolvency professional should refuse taking such appointment if she believes that there are conflicts of interest which may affect her functions. She may approach the Adjudicating Authority for suitable directions if conflicts arise after her appointment.

5.4. Group CoC

The CoC plays a critical role in the CIRP of a corporate debtor under the Code. Although the CoCs of different group members may have common creditors, they may be quite distinct where the group members have few common creditors. Formation of a CoC for the whole group is often used as a tool to procedurally coordinate the insolvency proceedings of group members and produce synchronised outcomes of such proceedings. The UNCITRAL Legislative Guide suggests that insolvency law may enable the establishment of a single CoC for the all the group members. However, this may be appropriate only in those circumstances where "*the interests of creditors of the different group members are not diverse and can be accommodated and appropriately protected in a single committee or where the creditors are common to the group members concerned.*"[88]

During consultations with international experts by the Committee, it was highlighted that in the US a single creditors' committee for all the group entities is generally constituted for the purposes of negotiating and finalising a group reorganisation plan. However, in cases involving a large number of group entities, *ad-hoc* committees comprising separate classes of creditors are often constituted for the purposes of ensuring an effective negotiation process. Additionally, it was pointed out that the group creditors' committee only negotiates and shortlists the plan in the US. The voting on the plan is done by the separate creditor committees of each group member, as they would have ordinarily voted in single entity insolvency proceedings. Similarly, to enable cooperation between the creditors' committees, the German insolvency legislation enables the setting up of a group creditors' committee that supports the insolvency representatives and the creditors' committees of individual debtors to pursue coordinated resolution.[89]

[88] UNCITRAL Legislative Guide, Recommendation 204 and Paras 22-25.

[89] Section 269c, German legislation, translated by Schultze & Braun GmbH & Co. KG, Insolvency and Restructuring in Germany – Yearbook 2019, <https://www.schultzebraun.de/fileadmin/de/Fachbuecher/Insolvenzjahrbuecher/Insolvenzjahrbuch2019/Insolvency_and_Restructuring_2019_rz.pdf?_=1547820263>

Similar to the practice in US and Germany, the Working Group recommended that CoCs of group members under the Code may decide if they would like to have a group creditors' committee in addition to the separate CoCs of each group member. It discussed that a group creditors' committee only supports the CoCs of each company, since the substantive rights vested in the financial creditors of each group company are not displaced by procedural coordination mechanisms. Therefore, a group creditors' committee should not be empowered to take decisions without the consent of the CoC of each company in a corporate group. **The Committee agrees that the formation of a group creditors' committee, at the discretion of CoCs of each group company, may be allowed**. **However, the Committee also noted that specific enabling provisions for formation of a group CoC may not be required in the Code. Since the group CoC is merely a facilitative body, the CoCs of the respective group members may decide to form such a body utilising the cooperation and coordination provisions in the Code. Thus, the Committee recommends that the respective CoCs of corporate debtors belonging to the same group may decide to form a group CoC to enable smoother coordination of the CIRP proceedings of such corporate debtors. Such group CoC would only provide procedural assistance and substantive decisions would continue to be taken by the separate CoCs of each corporate debtor.**

Nevertheless, the Committee discussed that the manner of forming a group CoC and the powers of such group CoC should be different if a group coordination proceeding has been initiated in respect of the corporate debtors. The recommendations of the Committee in this regard have been discussed in para 5.6 below.

Drafting Instructions (Box 8)

- A group CoC may be formed with adequate representation from CoCs of all group members. This may be at discretion of the CoCs and its constitution and formation may be subject to negotiation amongst parties. Specific enabling provisions for this may not be required in the Code.
- The group CoC may provide procedural assistance and should not be tasked with taking decisions that affect the substantive rights and obligations of the parties.

5.5. Communication, cooperation and information sharing

The UNCITRAL Legislative Guide notes that irrespective of whether procedural coordination mechanisms are ordered by the court, coordination of multiple proceedings may nevertheless be achieved among courts and among insolvency representatives, "*along the lines of articles 25 and 26*" of the Model Law on Cross-Border Insolvency (1997) ("**MLCBI**"). Accordingly, the UNCITRAL Legislative Guide recommends that different insolvency representatives administering multiple group insolvency proceedings should "*cooperate with each other to the maximum extent possible*", irrespective of whether procedural coordination mechanisms have been opened.[90] The UNCITRAL Legislative

[90] UNCITRAL Legislative Guide, Recommendations 234, 235.

Guide provides an inclusive list of the 'appropriate means' through which such cooperation may be achieved, which includes sharing of information concerning group members (subject to appropriate protection of confidential information), approving or implementing agreements to allocate responsibilities among insolvency representatives, coordinating "*administration and supervision of the affairs of the group members*" etc.[91]

In line with the recommendations of the UNCITRAL Legislative Guide, the MLEGI also requires courts to "*cooperate to the maximum extent possible*" with other courts, insolvency representatives and group representative (if any).[92] The MLEGI also provides an inclusive list of the 'appropriate means' of such cooperation, such as, communication of information by any means considered appropriate by the court; participation in communication with other courts, an insolvency representative or any group representative appointed; coordination of the administration and supervision of the affairs of enterprise group members; etc.[93]

Further, the MLEGI requires insolvency representatives to "*cooperate to the maximum extent possible*", with other courts, insolvency representatives of other group members and the group representative (if any).[94] The group representative is also required to cooperate in a similar manner with other courts and insolvency representatives of group members.[95] An indicative list of the 'appropriate means' of such cooperation is also provided, which includes sharing and disclosure of information, negotiation of agreements for coordination of proceedings, allocation of responsibilities among insolvency representatives etc.[96]

The Working Group had also recommended that the insolvency professionals, Adjudicating Authorities and CoCs of group members should "*be mandated to cooperate, communicate and share information with each other for effective administration of different insolvency proceedings*."[97] However, the Working Group was of the view that the extent of such cooperation, communication and information sharing should be left to the discretion of the corresponding participants.[98]

The Committee largely agrees with the recommendations of the Working Group in this regard. It discussed that the office-holders and CoCs should have the duty to effectively cooperate and coordinate the proceedings in all cases. However, the degree of cooperation required will vary from case-to-case based on the relevant circumstances and degree of interconnection of various group members. Therefore, the Committee agrees that the Code

[91] UNCITRAL Legislative Guide, Recommendation 236.

[92] MLEGI, Article 9.

[93] MLEGI, Article 10.

[94] MLEGI, Article 14.

[95] MLEGI, Article 13.

[96] MLEGI, Article 15.

[97] IBBI Working Group, 45.

[98] IBBI Working Group, 45.

should provide flexibility for parties to determine the degree of cooperation required. Office-holders and CoCs may consider entering into inter-se agreements to achieve such cooperation. **Thus, the Committee recommends that suitable provisions for mandating office-holders and CoCs to cooperate, coordinate and share information with each other should be provided in the Code. Nevertheless, it noted that since CIRP and liquidation proceedings are to be mandatorily transferred to the same NCLT, provisions mandating cooperation and coordination between NCLTs may not be required.**

Drafting Instructions (Box 9)

- The CoCs and insolvency professionals appointed in respect of corporate debtors belong to the same group should mandatorily be required to cooperate, coordinate and share information with each other.

5.6. Group Coordination Proceedings

Group coordination mechanisms aim at facilitating a coordinated strategy for the entire group. Consequently, such mechanisms involve the development of a plan for coordinating insolvency proceedings concerning various group members. Various laws and instruments, dealing with group insolvency, provide different kinds of group coordination mechanisms to procedurally coordinate concurrent insolvency proceedings of group members.

Although the UNCITRAL Legislative Guide does not make any specific recommendation regarding the manner in which a group coordination mechanism may be structured, it recommends enabling "*coordinated reorganization plans"* covering multiple group members.[99] Building on the recommendations of the UNCITRAL Legislative Guide, the MLEGI introduces a new form of group coordination mechanism called 'planning proceedings'. Such planning proceedings are aimed at developing a group insolvency solution which could include various ways of coordinating insolvency proceedings of group members (like a reorganization, a sale as a going concern of part or all of the business, a sale of assets, or a combination of a liquidation and reorganization of members of the group)[100]. Once recognized in cross-border scenarios, the planning proceeding would be the 'focal point' for coordination among group members for the purposes of developing a group insolvency solution.[101]

The EU Regulations also provide for a coordination mechanism called 'group coordination proceedings'. According to the EU Regulation, a group coordination proceeding may be

[99] UNCITRAL Legislative Guide, Recommendation 237.

[100] MLEGI, Article 2(f).

[101] UNCITRAL (Working group V), *Facilitating the cross-border insolvency of multinational enterprise groups: key principles* (28 September 2015) para 6 <https://undocs.org/en/A/CN.9/WG.V/WP.133>

opened before any court having jurisdiction over a group member[102] and should "*strive to facilitate the effective administration of the insolvency proceedings of the group members, and to have a generally positive impact for the creditors*".[103] Such group coordination proceedings are undertaken to develop a group coordination plan that provides "*a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies*."[104]

In line with the above, the Working Group also recommended that a group coordination mechanism called 'group coordination proceedings' should be enabled under the Code for the purposes of developing a group strategy. The group strategy has been suggested to be a flexible instrument which may contain various measures for coordinating the CIRP or liquidation proceedings of the corporate debtors belonging to a group.

The Committee has undertaken a review of the recommendations of the Working Group relating to group coordination proceedings. In doing so, it has also attempted to compare the recommendations of the Working Group to similar proceedings provided in the MLEGI (planning proceedings) and the EU Regulations (group coordination proceedings). The recommendations of the Committee in relation to group coordination proceedings under the Code are provided below. These recommendations have been arranged stage-wise, and the process flow for group coordination proceedings is illustrated in *figure 3* below.

5.6.1. Objective of a group coordination mechanism

The Committee noted that certain common elements may be found in the group coordination mechanisms under various instruments.

The objective of a group coordination mechanism is the development of a strategy or a plan to coordinate the insolvency proceedings of the various group members. The contours of such a plan or strategy have been defined differently in different instruments. However, they are usually designed to allow undertaking various measures that may maximise the value available to stakeholders of the whole group. Such measures would depend on the nature of entities included in the group, the kinds of creditors it has and the degree of integration of assets and liabilities within the group. This may include having information centres, undertaking common valuations, inviting common reorganisation plans for certain or all group members, undertaking common sale of assets, etc. Where the entities involved are viable for rescue and are heavily inter-connected, a strategy or a plan may lay down the manner in which a group-wide resolution would be undertaken.

[102] EU Regulation, Article 61(1).

[103] EU Regulation, Recital 57.

[104] EU Regulation, Article 72.

In light of the above, group coordination mechanisms are conducted concurrent to the insolvency proceedings of group members. Once a plan or a strategy is developed in the group coordination mechanism, it is applied to the insolvency proceeding of each such group member. Thus, group coordination mechanisms do not replace the insolvency proceedings of the group members, but work alongside such proceedings to facilitate their smooth conduct.

5.6.2. Initiation of a group coordination proceeding

The Working Group recommended two ways of initiating a group coordination proceeding, based on whether the respective corporate debtors are undergoing a CIRP or liquidation:

- *CIRP:* The Working Group noted that the CoCs would be best suited to assess the need for a group coordination proceeding, and recommended that the power to initiate group coordination proceedings in respect of corporate debtors undergoing a CIRP should be with the CoC of such corporate debtors. It envisaged that the CoCs of the participating group members would approve a framework agreement by requisite threshold. Such agreement would govern the group coordination proceedings and lay down details such as "*estimated costs and distribution of costs of proceedings, the group coordinator, the Adjudicating Authority that may hear proceedings, mechanisms to optout etc*".[105] It also suggested that where group coordination proceedings are opened, all Adjudicating Authorities should be intimated of the same, and all cases should be transferred to a single Adjudicating Authority chosen under the framework agreement.

- *Liquidation:* The Working Group recommended that, in liquidation, the liquidators appointed would have to apply to an Adjudicating Authority agreed to between them to commence group coordination proceedings. However, they should consult the stakeholders' consultation committee before making such application. Notably, it also recommended that group coordination proceedings at the stage of CIRP would not be carried forward at the stage of liquidation.

Under the EU Regulations, a group coordination proceeding may be opened voluntarily for effective administration of insolvency proceedings of group members. An insolvency practitioner who is appointed in the insolvency proceedings of one group company may apply for the opening of group coordination proceedings to any court having jurisdiction over the insolvency proceedings of a member of the group. The court may accept this application after giving insolvency practitioners a right of hearing if it is satisfied that-

> *"(a) the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members;*

[105] Report of the Working Group, Page 46.

(b) no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings; and
(c) the proposed coordinator fulfils the requirements laid down…"[106]

On the other hand, the MLEGI does not specify the parties that can apply to the court for initiation of planning proceedings, and the grounds for making such an application. Instead, it only provides the conditions for a proceeding to be considered a planning proceeding. According to the MLEGI, an insolvency proceeding[107] should be recognized as a 'planning proceeding' if three conditions are fulfilled: (i) it involves the participation of one or more other group members for the purpose of developing and implementing a group insolvency solution; (ii) a group member that is subject to a main proceeding[108] is likely to be a necessary and integral participant in that group insolvency solution; and (iii) a group representative has been appointed.[109] While the second condition may be relevant only from a cross-border perspective, conditions (i) and (iii) would apply to in a domestic context as well.

The Committee went through the above practices and agreed that the CoCs and liquidators of corporate debtors may be best suited to assess the need for a group coordination proceeding. It noted that although the EU Regulations provides insolvency practitioners with the power to assess the need for group coordination proceedings, in the context of the Code, such power may be more suitably placed with the CoC (if the corporate debtor is undergoing a CIRP). The CoC plays a proactive role under the design of the CIRP, as it is responsible for assessing the commercial viability of a corporate debtor and is empowered it to take key commercial decisions during CIRP. Thus, it concurred with the rationale of the Working Group in this regard.

However, the Committee noted that formulation of a framework agreement in order to initiate and govern the group coordination proceedings may be difficult to implement. Unlike most developed countries, the insolvency law in India is still evolving and the market is maturing gradually. Consequently, negotiating the components for the manner of

[106] EU Regulations, Article 63.

[107] Article 2(g) provides that a "*court with jurisdiction over a main proceeding of an enterprise group member*" may recognize 'a proceeding' as a planning proceeding. Thus, the court having jurisdiction over a main proceeding, may recognize the planning proceeding as a *separate proceeding* from the main proceeding; the planning proceeding and the insolvency proceeding of the concerned group member may not be the same proceeding. (*See* Draft Guide, para 44). Further, the concept of 'main proceeding' may not be of significance for the purposes of the present discussion.

[108] As the MLEGI does not define the term 'main proceeding' it is to derived from the definition of 'foreign main proceeding' as provided under Article 2(b) of the MLCBI. (*See* Draft Guide, para 23). Given this, its application would be relevant only in the context of cross-border group proceedings (which is discussed in the following Chapter of this Report)

[109] MLEGI, Article 2(g)

governing the group coordination proceeding may be a time-consuming process and may lead to initiation of group coordination proceedings at a late stage of CIRP of group members. Moreover, approval of the Adjudicating Authority for initiating a group coordination proceeding may be necessary to provide it proper sanctity, maintain appropriate oversight and resolve objections to the initiation of such a proceeding.

Given this, the Committee recommends that the **CoCs of two or more corporate debtors that belong to a group (undergoing CIRP) may vote by 66%, at any time during the CIRP, to initiate group coordination proceedings. On such vote, the resolution professional appointed in respect of any such corporate debtor shall apply to the Adjudicating Authority to order the initiation of group coordination proceedings. Where the corporate debtor is undergoing liquidation, the liquidator may apply to the Adjudicating Authority for initiation of group coordination proceedings after consulting the stakeholders' consultation committee.**

On receiving an application from the resolution professionals or liquidators, the Adjudicating Authority shall decide whether to accept or reject it. If accepted, a group coordination proceeding shall be initiated in respect of the corporate debtors whose resolution professionals or liquidators had made the application.

5.6.3. Appointment of a group coordinator

The appointment of a group coordinator is a common feature in the proceedings for coordination of group insolvencies in various instruments. As per Article 19 of the MLEGI, when a planning proceeding is opened, the court may appoint a group representative who "*shall seek to develop and implement a group insolvency solution*".[110] Under the EU Regulations, a group coordinator is appointed in a group coordination proceeding to identify recommendations for conducting insolvency proceedings of group members in a coordinated manner and propose a group coordination plan.[111] Similarly, in Germany, a proceedings coordinator is appointed to synchronize the proceedings of different group companies.[112]

In line with the above, the Working Group recommended that a group coordinator should be appointed when group coordination proceedings are initiated. It envisaged that the group coordinator would be responsible for proposing the group strategy. **The Committee noted that a group coordinator performs key functions in a group coordination proceeding. She coordinates with the CoCs and resolution professionals or liquidators of all participating corporate debtors in order to arrive at a strategy for effectively synchronizing their insolvency proceedings. It thus, recommends that a group coordinator should be appointed from the initiation of a group coordination proceeding.**

[110] MLEGI, Article 19.

[111] EU Regulations, Article 72.

[112] Section 269f, German legislation, translated by Schultze & Braun GmbH & Co. KG, Insolvency and Restructuring in Germany – Yearbook 2019.

Manner of appointment and eligibility

Considering that the Committee has recommended that initiation of a group coordination proceeding should be by way of an order of the Adjudicating Authority instead of a framework agreement, it discussed that a group coordinator should also be appointed by such order. **Thus, the Committee recommends that an application for initiation of a group coordination proceeding should mention the details of the proposed group coordinator. The Adjudicating Authority shall appoint such person as the group coordinator if it admits such application and if the proposed group coordinator meets the eligibility criteria for such appointment.**

In respect of the eligibility criteria for appointment as a group coordinator, **the Committee suggests that only persons registered as insolvency professionals under the Code should be eligible to be a group coordinator.** Further, in line with the requirements for the appointment of resolution professionals under the Code, **the proposed group coordinator should not have any pending disciplinary proceedings and should provide consent for being appointed as the group coordinator.**

It was also brought to the Committee that under the EU Regulations, a person acting as an insolvency practitioner in the insolvency process of one of the participating group companies is not eligible to be appointed as the group coordinator. Such restriction has been provided to avoid any conflict of interest for the group coordinator. On the other hand, the MLEGI does not expressly prevent the court from appointing an insolvency representative of a group member, as a group coordinator[113] nor does it contain any provision for resolving potential conflicts of interest arising out of the same.[114] The Committee noted that a restriction of this kind may not be required to be hardcoded in the statute as it would reduce flexibility for the CoCs in proposing a group coordinator. Further, appointing a person who is acting as a resolution professional or liquidator for one of the group companies may be beneficial in certain circumstances. **Consequently, the Committee suggests that such restriction on appointment of a group coordinator may not be required to be provided in the Code. However, it recommends that the Code should provide the flexibility to lay down additional eligibility criteria for the group coordinator in subordinate legislation.**

The Committee also noted that the CoCs of participating group companies should have the power to replace the group coordinator. **In this regard, it recommends that the Adjudicating Authority should replace a group coordinator if such replacement has been approved by CoCs representing fifty percent or more of the total debt owed by all the participating group companies. A CoC should be considered to have 'approved' such replacement if 66% of its voting share votes as such.**

Powers and duties of group coordinator

[113] Guide to Enactment, para 116.

[114] Guide to Enactment, para 116

The key reason for the appointment of a group coordinator is to develop a plan or a strategy to synchronize the insolvency proceedings of group companies participating in the group coordination proceeding.

The MLEGI allows a court to appoint a group representative to develop a 'group insolvency solution', which is defined as a plan which provides for the "*reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members*". Under the EU Regulations, a group coordinator is appointed to *inter alia* "*propose a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies*". In line with this, **the Committee recommends that the Code should specifically provide that the group coordinator is tasked with developing a group strategy and has a duty to identify and outline recommendations for the coordinated conduct of insolvency proceedings of the participating group members.**

In addition to the above, the Committee discussed that a group coordinator should also be responsible for conducting the group coordination proceeding and should act as a bridge between the multiple insolvency professionals appointed for various group companies. Towards this end, the group coordinator should perform various functions like constituting the group CoC and conducting its meetings; facilitate in resolving any disputes among the resolution professionals or liquidators (if requested by them); and assisting the resolution professionals and liquidators in seeking cooperation from other group companies. **The Committee also discussed that the group coordinator should have sufficient powers to enable her to avail information related to the insolvency process of the participating group companies.** For instance, the group coordinator should be able to attend meetings of the CoCs of participating group companies (if necessary), communicate directly with the resolution professionals and liquidators of participating group companies, requiring access to documents and information, etc.

It was also brought to the notice of Committee that the MLEGI and EU Regulations provide additional powers to the group coordinator, which are largely utilised in a cross-border scenario. For example, they are allowed to seek recognition of the coordination/ planning proceedings in other countries, seek stay of insolvency proceedings of participating group companies, take part in foreign proceedings in respect of a group company, etc. **The Committee discussed that although such powers may not be relevant for the group coordinator in a domestic scenario, the group coordinator may utilise general powers to approach the NCLT (like Section 60(5) of the Code) to seek any directions or orders from the Adjudicating Authority that may be necessary for her to discharge her duties.**

5.6.4. Participation in group coordination proceedings

Limited to insolvent corporate debtors

Coordination proceedings are usually *voluntary* in nature, and hence the participating group companies are only made a part of the group coordination proceedings if they choose so. As discussed above, the Working Group recommended that the scope of the group insolvency framework should be limited to corporate debtors that are undergoing a CIRP or liquidation process under the Code. Thus, solvent companies belonging to the same group would not be subject to the group coordination proceedings. The Committee agrees with the Working Group that since the Code extends only to those entities that have committed default, thus, no procedural coordination mechanism can be envisaged where insolvency proceedings under the Code do not exist. **Consequently, the Committee agrees that the scope of group coordination proceedings should be limited to corporate debtors that are undergoing a CIRP or liquidation process under the Code.**

The Committee also noted that the MLEGI allows a solvent entity to participate in the insolvency proceedings of an insolvent entity belonging to the same group.[115] Such participation would mean that the solvent entity will have the right to appear and to be heard in such insolvency proceeding, to make written submissions to the court on matters affecting its interests, and to take part in negotiations to develop and implement a group insolvency solution (if relevant).[116] **The Committee discussed that a similar provision may not be required in the Code.**

It noted that the MLEGI allows participation of solvent entities in the *insolvency* proceedings of another group member, and not the planning proceedings. As per the current practice under the Code, a company belonging to the same group can already file applications with the NCLT and be heard if it is an interested party and is affected by the CIRP or liquidation proceedings. Further, companies belonging to the same group may submit resolution plans like any other resolution applicant if they meet the requirements of Section 29A. Moreover, the Committee noted that this provision is meant to apply in a cross-border scenario as is evident from the Guide to Enactment, which discusses that this provision is meant to facilitate "*the participation of enterprise group members (wherever located) in the main proceeding*"[117]. Therefore, the Committee discussed that the scope of this provision of the MLEGI may not be relevant for the design of a group coordination proceeding under the Code.

Right to opt-in and opt-out

The Working Group recommended that once a group coordination proceeding has been opened, other corporate debtors belonging to the same group may join or *'opt-in'* the group coordination proceedings at a later stage in the manner as provided in the framework

[115] MLEGI, Article 18.

[116] *Ibid.*

[117] *See* MLEGI, Articles 2(g) and (j).

agreement.[118] Similarly, the EU Regulations allow group members to opt-in to the group coordination proceedings voluntarily after it has been initiated.

The Committee noted that considering the voluntary nature of group coordination proceedings, group members should have the flexibility to join the group coordination proceedings and absolute restrictions on joining such proceedings from the beginning may be counter-intuitive. Further, since insolvency proceedings of various group members may be at different stages, and some may be initiated after the opening of group coordination proceedings, a provision to opt-in later may be necessary to enable effective participation in the group coordination proceedings.

On the other hand, it was also felt that if there were no clarity on the group companies that are part of the group coordination proceeding indefinitely, it would be difficult to prepare and approve a group strategy. Since the group strategy is meant to guide coordinated resolution of the participating corporate debtors, developing such strategy would need to be undertaken in a timely manner for it to have meaningful outcomes. **Considering this, the Committee discussed that, once an order initiating the group coordination proceedings is passed, the applicant should send a copy to the resolution professionals and liquidators of all other corporate debtors belonging to the same group. The corporate debtors who had not applied for initiating the group insolvency proceedings may then have a 30-day period from the date of such order to opt-in the proceedings. If any corporate debtor intends to opt-in for the group coordination proceeding after this 30-day period, it should require the approval of the CoCs and liquidators of all participating group members.** This means that each CoC will have to approve it by at least 50% of its voting share and each liquidator would have to approve it as well.

Additionally, the Working Group also recommended that participating group members may choose to opt-out of the group coordination proceedings until a group strategy has been approved by the CoC of the group member. **The Committee agrees with this.**

5.6.5. Group CoC

Need to form a group CoC and its constitution

The Committee discussed that formation of a group CoC will make coordination more efficient as holding meetings or discussions with full CoCs of all group companies may be cumbersome. It discussed that the group coordinator may require the assistance of a body representing the CoCs of each participating group company to prepare a group strategy that would meet the interests of most creditors. Further, the probability of such a strategy ultimately being approved by the participating CoCs would be higher if their concerns are represented to the group coordinator from the beginning. **Therefore, the Committee recommends that a group CoC should be formed in all group coordination**

[118] Guide to Enactment, Para 105.

proceedings. The duty to constitute such group CoC would be on the group coordinator.

Further, the Committee recommends that the constitution of the group CoC should be provided in the subordinate legislation. It was discussed that the subordinate legislation should ensure that each CoC is adequately represented and has at least one representative on its behalf in the group CoC. It was also noted that some jurisdictions include representatives from workmen within such group CoCs to ensure adequate representation.[119] Thus, the Committee noted that it may be considered if representatives from employees and workmen and from operational creditors should also be included in the group CoC at the time of drafting the subordinate legislation in this regard.

Functions to be performed by the group CoC

The Committee discussed whether the group CoC should act merely as a coordinating and facilitative body for the participating CoCs without having any power to take substantial decisions on behalf of such CoCs. In this regard, the Committee noted that while such a facilitative body would help in increasing coordination and ensuring effective sharing of information among participating CoCs, in some cases, it would be more effective to empower the group CoC to take decisions on behalf of the CoCs themselves. For example, decisions like changing the capital structure, raising interim finance, undertaking related party transactions, etc. may be more value maximizing if taken on a group level in some cases. Given this, the Committee felt that a group coordination proceeding should enable each separate CoC of the participating group members to delegate its powers to the group CoC.

It, therefore, recommends that the Code should allow each participating CoC to pass a resolution by a majority vote of 66% of its voting shares, in order to authorize the group CoC in a group coordination proceeding to take certain decisions on its behalf. However, the Committee noted that the power to approve a resolution plan should remain with each separate CoC and should not be permitted to be delegated. In addition to this, the group CoC will have the responsibility of facilitating the coordination of insolvency proceedings of participating group members and assisting the group coordinator in developing a group strategy.

[119] This has been provided in Germany, *see* German legislation, translated by Schultze & Braun GmbH & Co. KG, Insolvency and Restructuring in Germany – Yearbook 2019.

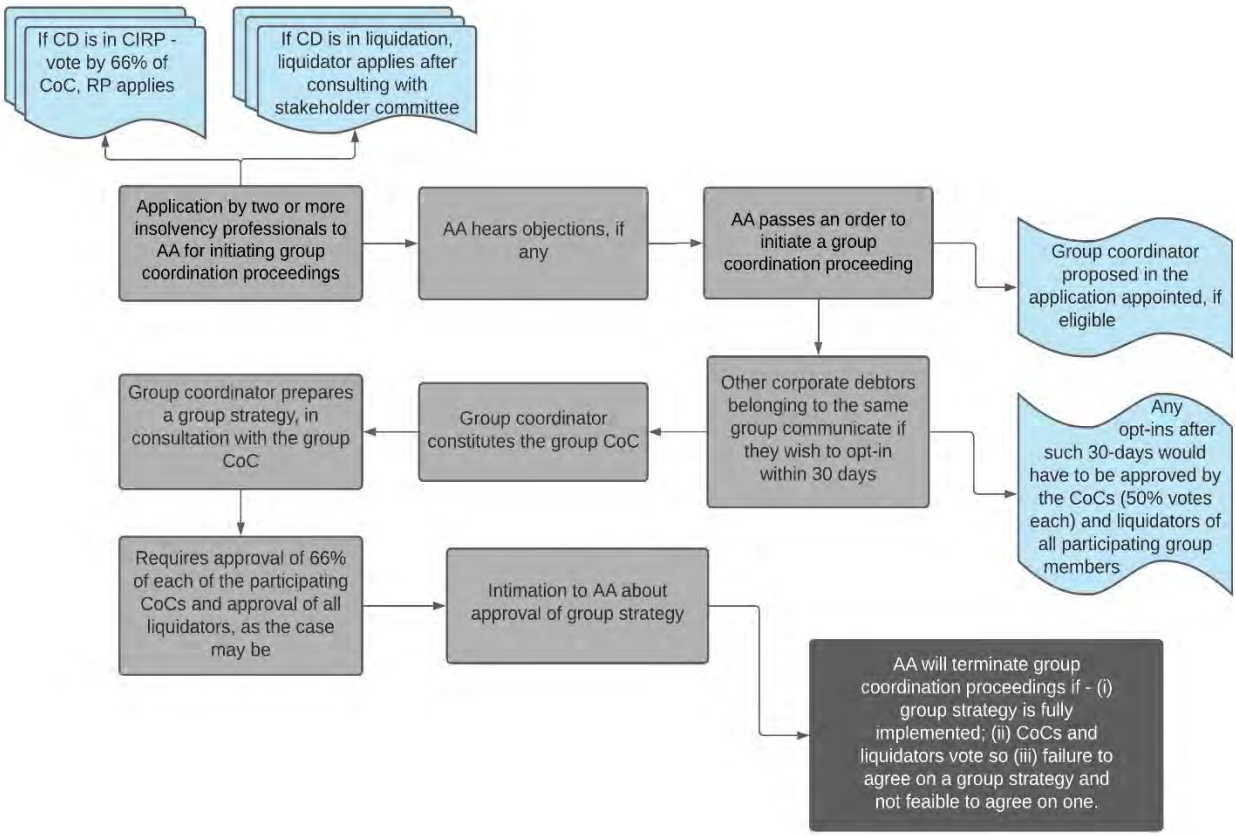

Figure 3: Process Flow for Group Coordination Proceedings

5.6.6. Development and approval of group strategy

As noted above, the objective of a group coordination proceeding is usually to come up with a plan or strategy that provides the manner in which the insolvency proceedings of the group companies are to be synchronised. Different instruments provide different degrees of flexibility in prescribing the possible contents of such a plan or strategy.

The MLEGI contains the concept of a 'group insolvency solution' that is developed in a planning proceeding. A group insolvency solution has been defined to mean a proposal "*for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members*".[120] The Guide to Enactment notes that this definition is intended to be interpreted flexibly so as to allow parties to develop solutions that are best suited to the group depending on the facts of the case.[121] Thus, it aims to facilitate parties in opting for measures that "*would, or would be likely to, either maintain or add value to the enterprise group as a whole or at least to the*

[120] MLEGI, Article 2(f).

[121] Guide to Enactment, Para 42.

enterprise group members involved"[122]. Although the MLEGI deals with planning proceedings and group insolvency solution in some detail, it does not lay down the procedure for approval of such a solution. Since the MLEGI largely deals with issues involved in cross-border scenarios, it leaves it to the law of the approving State to indicate the manner and procedures of seeking approval of a group insolvency solution. Further, while the MLEGI provides the manner in which global group insolvency solutions should be recognised and implemented in all relevant jurisdictions, it does not discuss the manner in which such a solution would bind parties.

Under the EU Regulations, a coordination plan is developed in a group coordination proceeding which "*identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies. In particular, the plan may contain proposals for:*

(i) *the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it;*
(ii) *the settlement of intra-group disputes as regards intra-group transactions and avoidance actions;*
(iii) *agreements between the insolvency practitioners of the insolvent group members*."[123]

The above definition of a coordination plan is also intended to provide flexibility to parties to propose distinct solutions that are suitable to the relevant group and group members participating in the group coordination proceeding. The group coordination plan is recommended by the group coordinator. The insolvency practitioners appointed in the insolvency proceedings of participating group members are not bound to follow the coordinator's recommended plan, but are required to furnish reasons if they don't.

The Working Group recommended that the group strategy should permit proposing various ways in which the CIRP or liquidation proceedings of the group members may be synchronised so as to maximize value available to stakeholders. It noted that a group strategy may involve a number of measures in any combinations, including "*valuation of the assets of the group together with a projected share of each separate company, the establishment of a common data room for prospective resolution applicants, the preparation of a common information memorandum, the invitation of a common Expression of Interest for some or all group companies, establishment of a group creditors' committee to negotiate with lenders, the invitation of a common resolution plan for some or all group companies, potential sharing of proceeds, settlement of intra-group debts, etc*".[124] Further, it suggested that the group coordinator would propose the group strategy and the CoCs would have to approve such strategy for it to be applicable to their respective company. Although the Working Group recommended that the Adjudicating Authority be intimated when group

[122] *Ibid.*

[123] EU Regulations, Article 72.

[124] IBBI Working Group, 46

coordination proceedings are opened, it does not recommend any approval of the group strategy from the Adjudicating Authority.

The Committee reviewed the above practices and discussed that the ideal solution in a group coordination proceeding would be to have a common or combined resolution of all participating group members. However, it noted that such a solution may not be feasible in all types of group structures. Further, the most value maximizing strategy for a group will depend on various factors like the degree of inter-connectedness in the group, the value of the estate, the costs of the proposed measures, etc. The optimal measures for participating members will also depend on whether they are undergoing a CIRP or liquidation process. For instance, measures like filing of consolidated periodic reports and a consolidated sale of assets would be suitable if the participating corporate debtors are undergoing liquidation proceedings. **Consequently, the Committee recommends that the group strategy should be broadly defined to permit various combinations of measures that synchronise the CIRP or liquidation proceedings of the participating corporate debtors. Such measures may be different for different companies included in the strategy.** For example, some participating group members may agree to a common valuation, some others may agree to release a common call for bids, some others may agree to only share information through virtual data rooms; etc., through the same strategy document.

In relation to the manner of approving a group strategy, the Committee discussed that a group strategy will be proposed by the group coordinator and she shall prepare such strategy in consultation with the group CoC. **The Committee suggests that a group strategy should require approval of all participating CoCs.** It recommends that a CoC would be considered to have approved a group strategy if 66% of its voting share passes a resolution to this effect. The 'voting share' here is the same as is determined under the CIRP, which is according to the value of debt of the financial creditors in the CoC. Where the CoC of any participating group member does not approve a group strategy, it may opt-out and exit the group coordination proceedings. **Where a corporate debtor participating in a group coordination proceeding is undergoing liquidation, the liquidator should decide whether to approve the group strategy for the corporate debtor it represents or if it should opt-out of the proceedings.** However, as noted above, the participating group members cannot opt-out once a group strategy has been approved.

The Committee also noted that the Working Group rightly recommended that a group strategy may not require the approval of the Adjudicating Authority. However, it was felt that since the Adjudicating Authority opens the group coordination proceedings, there may be merit in intimating the Adjudicating Authority about the approval of a group strategy. It noted that the group strategy should not require approval of the Adjudicating Authority as it would make the implementation of such strategy time-consuming and cumbersome. The Committee discussed that the group strategy is meant to be an agreement whereby parties come to a decision on the manner of coordinating concurrent insolvency proceedings. The design of the proceedings is aimed at ensuring that the group strategy is a facilitative document that parties may arrive at by negotiating with each other voluntarily. Thus, parties

should have the flexibility to modify the terms of the group strategy so that it continues to serve their needs throughout the duration of the concurrent insolvency proceedings (in accordance with the manner of making such revisions agreed to in it). **Considering this, the Committee recommends that the Code should provide that the group coordinator should file the group strategy with the Adjudicating Authority, once it is approved by the CoCs or liquidators. However, such filing shall only be undertaken for the purposes of intimating the Adjudicating Authority of the group strategy and not for receiving approval for implementation of the strategy.**

The Committee noted that once a group strategy is approved by the CoCs or liquidators, it would act as an agreement amongst the parties. **Therefore, once such approval is granted, the group strategy shall be binding on all persons that are parties to it. This means that the resolution professionals, liquidators and CoCs of the participating group members would be bound by the terms of the group strategy.** The group coordinator should have the power to approach the Adjudicating Authority for suitable directions if any of the parties fails to comply with the group strategy.

5.6.7. Termination of group coordination proceedings

The Committee discussed that since the Adjudicating Authority opens the group coordination proceedings by passing an order, it would be suitable for it to also pass a termination order to close the group coordination proceedings. **Thus, the Committee discussed that the Code should contain a provision listing the grounds on which the Adjudicating Authority should pass an order to terminate the group coordination proceedings. The responsibility to apply to the Adjudicating Authority for such a termination order shall be on the group coordinator appointed in respect of the group coordination proceedings.**

It noted that firstly, the group coordination proceedings should come to an obvious end where a group strategy has been approved and implemented. Consequently, the first ground on which the Adjudicating Authority should pass a termination order may be where the group strategy has been implemented fully. This would mean that all obligations within the strategy have been fulfilled and no further coordination may be required through group coordination proceedings. Secondly, since the group coordination proceedings are voluntary and optional, parties should be able to request termination of the proceedings. Thus, a termination order may be passed by the Adjudicating Authority if the CoCs and liquidators of the participating group members have agreed to such termination.

Thirdly, there may be scenarios where the CoCs and liquidators are not able to pass unanimous approvals for either the group strategy or termination. This may be due to holdouts by some participants or issues with achieving requisite votes within each CoC. Thus, the group coordinator may apply for termination of the group coordination proceedings if a group strategy has not been agreed to and the group coordinator is of the opinion that reaching such agreement is not feasible.

5.6.8. Costs and timeline

The Working Group recommended that the costs of conducting the group coordination proceedings should be decided by the framework agreement of the CoCs. The Committee discussed that since the CoCs are not required to enter into a framework agreement in its recommendations, an alternative way of determining costs will need to be provided. Primarily, **the Committee discussed that the Code may provide that the costs of conducting group coordination proceedings should form part of the insolvency resolution or liquidation process costs of the participating group members. Further, the manner in which such costs should be borne by participating group members may be provided in subordinate legislation**. Further, if the group strategy involves the incurring of any costs, the treatment of such costs should be provided in the group strategy itself.

In respect of timelines, the Working Group recommended that the timeframe for proceedings of any company that has opened group coordination proceedings may be extended by an additional period of up to 90 days on an application to the Adjudicating Authority. **The Committee agreed with this recommendation of the Working Group.**

Drafting Instructions (Box 10)

- The law should enable group coordination proceedings for corporate debtors belonging to the same group and undergoing a corporate insolvency resolution or liquidation process under the Code.
- A group coordination proceeding may be opened on application made by two or more CoCs of corporate debtors belonging to a group. If the corporate debtor is in liquidation, the application may be made by the liquidator. Such applications will be made to the Adjudicating Authority.
- The Adjudicating Authority may open the group coordination proceedings and appoint a group coordinator (as proposed in the application and subject to eligibility criteria). The proceedings will run alongside the separate insolvency or liquidation proceedings of the corporate debtors.
- The group coordinator will conduct the group coordination proceedings and develop a group strategy. A group strategy may provide various permutations and combinations of measures that synchronise the insolvency resolution or liquidation proceedings of the participating corporate debtors. Such measures may be different for different companies included in the strategy. The group coordinator will also assist the resolution professionals, liquidators and CoCs of the corporate debtors so as to enable effective coordination amongst them
- Participation of a corporate debtor in the group coordination proceeding should be voluntary. The CoCs should have flexibility to opt-in to the group coordination proceedings until 30 days after its opening. Any opt-ins after such time may be permitted with the approval of the participating CoCs and liquidators. For such approval, each CoC would have to vote in favour of such opt in by at least 50% of each of their voting shares. The participating group members may opt out of the

group coordination proceedings at any time until a group strategy has been approved by their respective CoC or liquidator.

- The group coordinator shall constitute a group CoC consisting of suitable representatives from CoCs of all participating group members, as may be prescribed in subordinated legislation. The group CoC may perform functions delegated to it by separate CoCs. However, the power to approve a resolution plan shall not be permitted to be delegated to the group CoC.
- A group strategy should require the approval of all participating CoCs by 66% of each of their voting shares respectively. Where a corporate debtor participating in a group coordination proceeding is undergoing liquidation, the liquidator should decide whether to approve the group strategy for the corporate debtor it represents. Once approved, the group strategy shall be filed with the Adjudicating Authority and shall be binding on all parties to the group strategy. If any CoC does not vote in favour of the group strategy, it may opt out of the group coordination proceeding.
- A group coordination shall terminate if the group coordinator applies for a termination order, which may be on the grounds that – (a) the group strategy has been approved and fully implemented; (b) if the CoCs and liquidators have approved such termination by requisite majority; (c) if the CoCs and liquidators fail to approve a group strategy and the group coordinator is of the opinion that it is not feasible for participating group members to agree on a group strategy.
- The costs of conducting group coordination proceedings should form part of the insolvency resolution or liquidation process costs of the participating group members.
- Where group coordination proceedings are opened, an additional 90 days may be added to the time period for completion of the insolvency resolution process for the participating corporate debtors.

6. Rules to deal with perverse behaviour

The Working Group considered the provisions related to avoidance of transactions and wrongful trading under the Code sufficient for dealing with any perverse behaviour in relation to group insolvency. However, it recommended that a provision allowing the subordination of intra-group claims by the Adjudicating Authority in exceptional circumstances may be provided in the Code. It discussed that subordination of intra-group debts without evidence of wrongdoing is likely to have an adverse effect on the ability of individual group members to arrange for adequate finance, especially during a period of financial distress when external creditors may not be willing to provide additional finance to it. Thus, it suggested that subordination may be permissible if there is evidence of fraud, diversion of funds, etc.

The Committee discussed the need for a provision for subordination of intra-group claims. Firstly, it noted that subordination orders have already been passed by NCLTs in certain

cases despite no specific provision to this effect.[125] Secondly, it discussed that many jurisdictions do not provide courts the power to subordinate debts, and the Working Group relied on the practice in the US to recommend such a power under the Code. Under the US Insolvency Code, courts are allowed to subordinate debts which is known as 'equitable subordination'.[126] The Committee noted that the power of equitable subordination in the US allows courts to not just subordinate intra-group debts, but any debts as long as the grounds for ordering subordination are met.[127] The jurisprudence developed under this provision is, thus, not limited to intra-group claims but has developed as a general power of the court. Therefore, it may be difficult to transpose it in the present context. Further, in situations of fraud or diversion of funds, subordination orders may be required to be passed not just against claims of group companies but even other claims. Considering this, it may be inadequate to consider equitable subordination only for intra-group claims.

The Committee discussed that the power to order subordination is a wide power and may only be utilised in rare and exceptional circumstances. Considering such orders have been passed under the Code even now, legislating a specific provision for subordinating intra-group claims may not be necessary. It noted that detailed provisions targeting perverse behaviour in group insolvency scenarios should be legislated based on practice developed under the Code in due course. **Thus, the Committee recommends that a provision for subordination of intra-group claims in the Code may not be required.**

7. The MLEGI and cross-border group insolvency

In para 2 above, it has been discussed that the law on group insolvency in India may be implemented in phases, with the first phase only applying to domestic group insolvency. It has also been noted that the Committee has recommended that the MLEGI may not be adopted at present, and the rationale for the same has been provided therein. For benefit of reference, a brief overview of the MLEGI has been provided below. The MLEGI chiefly deals with cross-border group insolvency and the issues involved in the MLEGI may be considered the key issues in instances of cross-border group insolvency.

The MLEGI was developed to address a gap in the original MLCBI which had not foreseen the need to provide for the management and coordination of multiple insolvency proceedings of affiliated companies belonging to a single enterprise group. It includes provisions on cooperation and coordination of proceedings, the development of a group insolvency solution, procedures to hold planning proceedings among enterprise group entities and incentives to minimise the commencement of 'non-main' insolvency proceedings.

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[125] For instance, *J.R. Agro Industries P. Ltd v. Swadisht Oils P. Ltd*, Company Application No. 59 of 2018 in Company Petition No. (IB)13/ALD/2017- decision dated 24.07.2018.

[126] *See* Section 510(c) U.S. Code Title 11, Pepper v. Litton (308 U.S. 295 (1939)), Benjamin v. Diamond (563 F.2d 692 (5th Cir. 1977).

[127] *Ibid.*

- *Relationship between MLEGI and MLCBI*: Although some measures in the MLEGI are similar to relief that can be found in the MLCBI, the focus of the MLEGI is managing and coordinating the specific needs of insolvency proceedings affecting multiple enterprise group members, as opposed to a single debtor seeking recognition in multiple jurisdictions. The MLEGI has been drafted as a stand-alone text to enable it to be adopted without first having to adopt the Model Law on Cross-Border Insolvency, but it is designed to be incorporated into and complement the MLCBI. Thus, the two model laws should either be adopted together, or the jurisdiction seeking to adopt the MLEGI should have already adopted the MLCBI.

- *Cooperation and coordination:* Cooperation and coordination are core provisions to the MLEGI. It provides a non-exhaustive list of examples of cooperation, including communication between courts, insolvency representatives and group appointed representatives; coordination of supervision and management of the affairs of the enterprise group; coordination of insolvency proceedings and hearings; the ability to enter into coordination agreements, cost sharing arrangements and simplified dispute resolution mechanisms; and modified claims treatment procedures.[128] It also contains provisions for allowing direct communication between courts, which may avoid time-consuming procedures implemented through diplomatic channels in cross-border scenarios.

- *Planning proceedings and relief:* The MLEGI provides the ability to participate in a 'planning proceeding' to develop a group insolvency solution. The planning proceeding is intended to be a 'main proceeding' (drawing from the definition of a 'foreign main proceeding' in the MLCBI) where the debtor has its centre of main interests or where a court with jurisdiction over the main proceeding approves a separate planning proceeding. The meaning of a group insolvency solution has been discussed above. Once a planning proceeding is commenced or recognised, the group representative may request the court to grant 'any appropriate relief' in order to protect or preserve value of an enterprise group member. The examples of relief listed in the MLEGI are typical for insolvency proceedings and include stays, injunctions, discovery and the approval of funding arrangements for enterprise group members.

- *Synthetic proceedings:* The MLEGI also seeks to minimise the opening of 'non-main' proceedings for all of the enterprise group members by providing for mechanisms to facilitate the treatment of foreign creditor claims in the planning proceeding in accordance with the law that would have been applicable to those proceedings, where appropriate.[129] These mechanisms have been referred to as 'synthetic' proceedings, where the claims of a foreign creditor are accorded the same treatment in a main proceeding as it would have received in a foreign 'non-main' proceeding under applicable law, were such proceeding to commence. These

[128] MLEGI, Articles 9-18.

[129] MLEGI, Article 28.

'synthetic' proceedings may preserve value for the enterprise group by allowing for the centralised treatment of claims and alleviating the need to commence multiple 'non-main' proceedings.

8. Building Capacity

In order to implement the group insolvency framework under the Code, several capacity building measures may need to be undertaken. In respect of Adjudicating Authorities, procedures to enable listing cases of corporate debtors belonging to the same group together may be required. Also, depending on the flow of cases, there may also be need to undertake calibrated expansion of bench strength at NCLT and NCLAT. The expansion of court capacity, at the NCLT and the NCLAT, will have to be accompanied by commensurate augmentation of the capacity of the court registry

Effective training and knowledge building measures should also be undertaken with both judges at different levels in the insolvency processes and with insolvency professionals. Training of registry of staff at NCLT and NCLAT as well as development of standards of procedure for treating applications related to groups may be beneficial. Furthermore, the IBBI will be required to prepare regulations under the group insolvency framework and may require bolstering of its organisational and human capacity.

Utilisation of internet-based technologies may also be increased to enable smooth conduct of proceedings. Since all cases of a group would be carried out in the same forum, digitising processes like filing and procedural hearings may aid in bridging the gap in accessibility that some parties may face. Reliance on information utilities for verifying information may also be beneficial and the information utility infrastructure may be bolstered for this purpose.

Annexure I: Constitution of the Committee

No. 30/27/2018 Insolvency Section
Government of India
Ministry of Corporate Affairs

5th Floor, A wing
Shastri Bhawan, New Delhi
Dated: 23.01.2020

Order

Subject: - Constitution of a committee for recommending Rules & Regulatory framework for smooth implementation of proposed Cross Border Insolvency provisions in the Insolvency & Bankruptcy Code, 2016.

The Insolvency Law Committee (ILC) examined the suggestions/representations from public & stakeholders, deliberated on the provisions among its members and accordingly submitted its report on Cross border Insolvency, which provides recommendations of the Committee on adoption of the UNCITRAL Model Law in India with the modifications as considered necessary by the ILC in the Indian context. The Committee has also recommended a few carve outs to ensure that there is no inconsistency between the domestic insolvency framework and the proposed Cross Border Insolvency Framework.

2. For smooth implementation of the cross border insolvency provisions under the Insolvency & Bankruptcy Code, 2016 (Code) it has been decided to refer the matter to a committee to suggest its recommendations on rules & regulatory framework for smooth implementation of proposed Cross Border Insolvency provisions in the Code to this ministry on following terms of reference:

(i) The committee will study & analyze the recommendations of Insolvency Law Committee (ILC) Report on cross border insolvency and the proposed draft Bill to make recommendations to operationalize the rules & regulatory framework for smooth implementation of proposed cross border insolvency provisions under the Insolvency and Bankruptcy Code, 2016 and other matter related to or incidental thereto.

(ii) The Committee may invite or co-opt practitioners, experts or individuals who have knowledge or experience in the subject matter. The Committee may also consult other stakeholders as part of its deliberations.

3. The composition of the Committee is as under:-

(i)	Shri K.P. Krishnan, IAS (Retd):	Chairman
(ii)	Ms Aparna Ravi, Partner, Samvad Partners:	Member
(iii)	Shri Abizer Diwanji, EY India Financial Services:	Member
(iv)	Shri C.S. Shetty, MD Stressed Assests Resolution Group, SBI:	Member
(v)	Shri Harshvardhan Raghunath, Partner/Senior Advisor, Bain & Co:	Member
(vi)	Shri Somasekhar Sundaresan, Advocate:	Member
(vii)	Shri M. Unnikrishnan, CGM, IBBI:	Member
(viii)	Representative of Department of Economic Affairs not below the rank of Joint Secretary:	Member

4. Secretarial support to the Committee will be provided by Insolvency and Bankruptcy Board of India which will also bear the expenses incurred by the non-official members of the committee towards travel, local conveyance and other allowances as per extant government instructions, wherever the sponsoring agency is unable to bear their expenditure.

5. The Committee shall submit its recommendations within three months from its first meeting.

6. This issues with the approval of Secretary, Corporate Affairs.

(Rakesh Tyagi)
Director

To

All members

Copy to:-

i. PS to CAM
ii. PS to MOS for CA
iii. Sr. PPS to Secretary, MCA
iv. Secretary, DEA with a request to nominate an officer not below the rank of Joint Secretary as member of the Committee
v. Chairperson, IBBI
vi. PS to AS
vii. PS to JS(G)

No. 30/27/2018-Insolvency Section
Government of India
Ministry of Corporate Affairs

5th Floor, A wing
Shastri Bhavan, New Delhi
Dated:21.02.2020

Order

Subject: Constitution of a committee for recommending Rules & Regulatory framework for smooth implementation of proposed Cross Border Insolvency provisions in the Insolvency & Bankruptcy Code, 2016

Pursuant to the issuance of order dated 23.01.2020, I am directed to issue the instant addendum to the said order, wherein the following term of reference as point no. (iii) may be inserted after 2(ii):-

(iii) "The committee will study and analyze UNCITRAL Model Law for enterprise group insolvency and will make its recommendations in the context of Insolvency and Bankruptcy Code, 2016."

This issues with the approval of Secretary, Corporate Affairs

(Rakesh Tyagi)
Director

To

(i) Shri K.P. Krishnan, IAS (Retd)
(ii) Ms Aparna Ravi, Samvad Partners
(iii) Shri Abizer Diwanji, EY India Financial Services
(iv) Shri C.S. Shetty, MD Stressed Assests Resolution Group, SBI
(v) Shri Harshvardhan Raghunath, Partner /Senior Advisor, Bain & Co.
(vi) Shri Samasekhar Sundaresan, Advocate
(vii) Shri M. Unnikrishnan, CGM, IBBI
(viii) Shri. A.M. Bajaj, Joint Secretary, DEA

Copy to:-

(i) PS to CAM
(ii) PS to MOS for CA
(iii) Sr. PPS to Secretary, MCA
(iv) Chairperson, IBBI

Annexure II: Members of the Research Team

The Research Team for this committee was an inter-disciplinary team of persons with a background in law, economics and finance. It comprised the following persons (in alphabetic order of their surnames):

Research Team		
Sr. No.	**Name**	**Designation & Organisation**
1	Ms. Varsha Mahadev Aithala	Research Fellow, Azim Premji University
2	Mr. M. V. Pratap Kumar	Advocate
3	Mr. Kahnav Mahajan	Advocate
4	Mr. Ameya Vikram Mishra	Advocate
5	Ms. Aishwarya Satija	Senior Resident Fellow, Vidhi Centre for Legal Policy
6	Mr. Oitihjya Sen	Research Fellow, Vidhi Centre for Legal Policy
7	Ms. Anjali Sharma	Lead Research Consultant, Finance Research Group
8	Mr. Yadwinder Singh	Assistant Manager, IBBI
9	Mr. Karthik Suresh	Research Fellow, National Institute of Public Finance and Policy
10	Ms. Bhargavi Zaveri	Lead Research Consultant, Finance Research Group

Annexure III: List of Experts Consulted by the Committee

The Committee held consultations with the following people:

List of consultations held with external experts		
Sr. No.	**Name**	**Designation & Organisation**
1.	Mr. Justice Alastair Norris	Rtd. Judge High Court of England & Wales
2.	Prof. Irit Mevorach	Professor, University of Nottingham
3.	Mr. Richard A. Chesley	Managing Partner, DLA Piper, Chicago
4.	Mr Ashok Kumar	Blackoak LLP, Singapore
5.	Mr. Clive Barnard	Partner, Herbert Smith Freehills LLP, UK
6.	Mr. James H.M. Sprayregen	Partner, Kirkland & Ellis LLP, USA

Annexure IV: Draft Part ZA

CHAPTER I

PRELIMINARY

1. Applicability.

(1) This Part shall apply to a corporate debtor that is undergoing the corporate insolvency resolution or liquidation process, under Part II of this Code, and forms part of a group.

(2) Save as otherwise expressly provided in this Part, the provisions of this Part shall apply without prejudice to the provisions of Part II of this Code.

2. Definitions.

In this Part, unless the context otherwise requires—

(1) "control" includes the right to appoint majority of the directors or other key managerial personnel entitled to manage the affairs of the body corporate or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding, management rights, ownership interest, shareholders agreements, voting agreements, articles of association, limited liability partnership agreements or in any other manner;

(3) "group" means two or more corporate debtors that are interconnected by control or significant ownership;

Explanation: It is hereby clarified that, a 'group' shall include a holding company, a subsidiary company and an associate company of a corporate debtor, as defined under Companies Act, 2013.

(3) "group coordinator" means an insolvency professional appointed by the Adjudicating Authority, in the manner laid out in Clause 5;

(4) "group coordination commencement date" means the date on which the Adjudicating Authority passes an order under item (a) of sub-clause (1) of Clause 4 admitting an application for commencing a group coordination proceeding;

(5) "group coordination proceeding" means a proceeding commenced in accordance with the provisions of this Part for arrival at a group strategy;

(6) "group member" means a corporate debtor that forms part of a group and is undergoing an insolvency or liquidation proceeding under Part II of this Code;

(7) "group strategy" means an agreement providing measures to coordinate and synchronise different aspects of the insolvency proceedings of participating group members that may be performed by some or all participating group members, as provided under Clause 9;

(8) "insolvency proceeding" means the corporate insolvency resolution process and liquidation process under Part II of this Code;

(9) "non-participating group member" means a group member that is not participating in a group coordination proceeding, as provided under Clause 6;

(10) "participating group member" means a group member participating in a group coordination proceeding in the manner provided under Clause 6;

(11) "significant ownership" includes the right to exercise twenty-six per cent or more voting rights;

(12) the words and expressions used but not defined in this Part shall have the meanings assigned to them under Part II of this Code.

CHAPTER II

GROUP COORDINATION PROCEEDINGS

3. **Application for initiation of group coordination proceedings.**

(1) Subject to sub-clauses (2) and (3), an application for initiation of a group coordination proceeding, may be filed with the Adjudicating Authority on behalf of two or more group members, by their respective resolution professionals, or liquidators or both, as the case may be, in the manner provided in this Clause.

(2) A resolution professional shall file an application under sub-clause (1) on behalf of a corporate debtor if the committee of creditors of such corporate debtor approves the filing of such application by a vote of not less than sixty-six per cent of the voting shares.

(3) A liquidator shall, prior to filing an application under sub-clause (1) on behalf of a corporate debtor, consult with stakeholders of such corporate debtor in such manner as may be specified.

(4) An application under sub-clause (1) shall be filed in such form and manner as may be prescribed, and shall provide the following details:

(a) financial information of all corporate debtors belonging to the same group and undergoing an insolvency proceeding;

(b) information relating to the insolvency professional proposed to be appointed as a group coordinator; and

(c) such other details as may be prescribed.

(5) The applicant shall forward a copy of the application filed under sub-clause (1) to the resolution professional or liquidator of all group members within three days of filing such application.

4. **Admission or rejection of application.**

(1) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application under sub-clause (1) of Clause 3, by an order—

(a) admit the application, if it is complete; or

(b) reject the application, if it is incomplete.

(2) An order admitting the application under sub-clause (1) shall:

(a) have the effect of initiating a group coordination proceeding in respect of all group members of the corporate debtors on behalf of whom the application under Clause 3 is filed;

(b) appoint a group coordinator in the manner laid out in Clause 5;

(c) direct the manner in which the group coordinator shall report to the Adjudicating Authority about the progress of the group coordination proceedings, if deemed necessary; and

(d) contain such other directions as may be deemed necessary to ensure the smooth functioning of the group coordination proceeding.

(3) Where the Adjudicating Authority has passed an order admitting the application, under item (a) of sub-clause (1), the group coordinator appointed thereof shall forward a copy of such order to the resolution professionals and liquidators of all group members, as the case may be, within three days of passing of the order.

(4) Where an order admitting an application for a group coordination proceeding is passed, the Adjudicating Authority that passes such an order shall have exclusive jurisdiction over all proceedings under the Code in respect of a member of the group involved in the group coordination proceeding until the termination of the group coordination proceeding.

5. **Appointment, powers and duties of the group coordinator.**

(1) The Adjudicating Authority shall appoint a group coordinator to conduct the group coordination proceeding on the group coordination commencement date.

(2) The Adjudicating Authority shall appoint a person proposed by the applicant to act as a group coordinator if such person:

(a) is registered as an insolvency professional;

(b) does not have disciplinary proceedings pending against him;

(c) consents to such appointment in the specified form; and

(d) meets such other requirements as may be specified.

(3) The group coordinator appointed under sub-clause (2) or under Clause 8, as the case may be, shall conduct the group coordination proceeding, till an order terminating the group coordination proceeding is passed by the Adjudicating Authority under Clause 10.

(4) The group coordinator shall perform the following duties:

(a) constituting the group committee of creditors, in the manner provided under Clause 7;

(b) conducting the group coordination proceeding, and meetings of the group committee of creditors in the manner provided in Clause 7;

(c) developing a group strategy in accordance with Clause 9;

(d) extending all assistance and cooperation to the resolution professionals or liquidators of every participating group member, as the case may be, as may be necessary to enable coordination of the insolvency proceedings of such group members;

(e) identifying and outlining recommendations for the coordinated conduct of the insolvency proceedings of the participating group members in consultation with the group committee of creditors, and developing a group strategy as provided in Clause 9;

(f) facilitating resolution of disagreements between resolution professionals and liquidators of participating group members, as the case may be, if requested by such resolution professionals and liquidators;

(g) assisting the resolution professional or liquidator of one participating group member, as the case may be, to seek necessary cooperation or information, from other participating group members;

(h) performing such other duties as may be specified.

(5) The group coordinator shall have the following powers—

(a) communicating directly with the resolution professionals or liquidators of the participating group members, as the case may be;

(b) requiring the resolution professionals or liquidators of the participating group members, as the case may be, to:

(i) provide access to the group coordinator to such documents and records of the participating group members, and their respective insolvency proceedings, as may be required by him for the purposes of identifying measures to coordinate the insolvency proceedings of such group members;

(ii) attend meetings with the group coordinator in order to coordinate the insolvency proceedings of the participating group members;

(iii) send the group coordinator notices of meetings of the respective committees of creditors, if any;

(c) attending meetings of the committee of creditors of the participating group members, if deemed necessary by the group coordinator;

(d) requesting information or assistance from the resolution professionals or liquidators of the non-participating group members, as the case may be, as may be required for the purposes of identifying measures to coordinate the insolvency proceedings of such group members; and

(e) such other powers as may be specified.

6. **Participation in a group coordination proceeding.**

(1) In case of a group member undergoing a corporate insolvency resolution or liquidation process under Part II of this Code,

(a) the committee of creditors, by a vote of not less than sixty-six per cent of its voting shares; or

(b) the liquidator, after consultation with stakeholders of the group member he represents in the manner as may be specified,

may, within thirty days of the group coordination commencement date choose to participate in a group coordination proceeding.

(2) The resolution professional or liquidator of a group member, as the case may be, shall inform the group coordinator in writing that the group member he represents intends to participate in the group coordination proceeding along with a copy of the resolution or consultation referred to in sub-clause (1).

(3) Upon the receipt of an intimation under sub-clause (2), the group coordinator shall allow the relevant corporate debtor to participate in the group coordination proceeding.

(4) After the expiry of thirty days of the group coordination commencement date, a non-participating group member shall be allowed to participate in the group coordination proceeding if such participation is approved by the committees of creditors and liquidators of all participating group members:

Provided that the approval of a committee of creditors under this sub-clause shall require a vote in favour of such an approval by at least fifty percent of its voting shares.

(5) Without prejudice to sub-clause (6), in case of a group member undergoing a corporate insolvency resolution or liquidation process under Part II of this Code,

(a) the committee of creditors, by a vote of not less than sixty-six per cent of its voting shares; or

(b) the liquidator, after consultation with stakeholders of the group member he represents in the manner as may be specified,

may, any time prior to a group strategy being approved by its committee of creditors or liquidator, as the case may be, withdraw participation from the group co-ordination proceeding by a notice in writing to the group coordinator.

(7) The withdrawal referred to in sub-clause (6) shall be effective from the date on which the group coordinator receives such notice from the concerned resolution professional or the liquidator, as the case may be.

(8) If, during the course of a group coordination proceeding, a liquidation proceeding is initiated against a participating group member, the liquidator appointed in such liquidation proceeding shall decide whether or not to continue to participate in the group coordination proceeding.

(9) The group coordinator shall intimate the Adjudicating Authority of the list of participating group members forthwith on the expiry of the thirty-day period mentioned in sub-clause (4).

Explanation I: It is hereby clarified that if a participating group member withdraws participation from the group coordination proceeding in the manner provided under this Clause, such group member shall be referred to as a 'non-participating group member' with effect from the date of receipt of notice referred to in sub-clause (7).

Explanation II: For the removal of doubts, it is hereby clarified that a corporate debtor that is not undergoing an insolvency proceeding, shall not be permitted to participate in a group coordination proceeding.

7. **Group committee of creditors.**

(1) The group coordinator shall, based on the information received under sub-clause (1) of Clause 6, constitute a group committee of creditors representing the participating group members, in such manner and comprising such members as may be specified.

(2) The group committee of creditors shall have the following duties:

(a) facilitating the coordination of insolvency proceedings of participating group members, or any part thereof, with the assistance of the group coordinator;

(b) conducting consultations with the group coordinator in order to assist him in developing a group strategy for coordination of insolvency proceedings of participating group members, or any part thereof; and

(c) performing any other functions delegated to it by the committees of creditors of the participating group members, as provided in sub-clause (3).

(3) Notwithstanding anything contained in this Code, the committees of creditors of participating group members may, by a vote of not less than sixty-six percent of their voting shares, delegate any of their powers and functions under this Code and the rules and regulations thereunder to the group committee of creditors, as they may deem fit, in such manner as may be specified:

Provided that, the powers and functions of the committees of creditors under sub-section (4) of Section 30 cannot be delegated by any of the committees of creditors of the participating group members to the group committee of creditors under this Clause.

(4) The meetings of the group committee of creditors, along with the manner of voting, shall be conducted in such manner as may be specified.

8. **Replacement of a group coordinator.**

(1) At any time during a group coordination proceeding, a group coordinator may be replaced with another person eligible to be a group coordinator, if the committees of creditors and liquidators of the participating group members, representing fifty percent or more of the total debt owed by all the participating group members, have resolved to replace the group coordinator.

(2) Without prejudice to sub-clause (1), a committee of creditors of a participating group member shall be considered to have resolved to replace the group coordinator if it has voted to do so by a vote of not less than sixty-six percent of its voting shares.

(3) The committees of creditors and liquidators of the participating group members referred to in sub-clause (1) shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority

(4) The Adjudicating Authority shall forward the name of the proposed group coordinator to the Board for its confirmation and such insolvency professional shall be appointed by the Adjudicating Authority as the group coordinator within seven days of receipt of the name of proposed group coordinator under sub-clause (3), if the requirements provided under sub-clause (2) of Clause 5 are met.

(5) Where the proposed group coordinator fails to meet any of the requirements provided under sub-clause (2) of Clause 5, the group coordinator appointed under Clause 5 shall continue until the appointment of another group coordinator under this Clause.

9. **Development and approval of a group strategy.**

(1) The group coordinator shall develop a group strategy for the coordination of insolvency proceedings of participating group members, or any part thereof, in consultation with the group committee of creditors, in such manner as may be specified.

(2) Notwithstanding anything to the contrary contained in this Code, a group strategy may provide measures to coordinate and synchronise different aspects of the insolvency proceedings of participating group members and may include:

(a) undertaking a combined valuation of all or any of the assets of the participating group members;

(b) establishing a common platform for storing information and documents related to the insolvency proceedings of the participating group members;

(c) preparing a common information memorandum in respect of some or all participating group members;

(d) negotiation and settlement of the claims that the participating group members may have against each other;

(e) negotiating resolution plans of some or all participating group members together; and

(f) such other aspects as may be agreed upon by the participating group members.

(3) The group coordinator shall circulate the group strategy developed under sub-clause (1) to the resolution professional or liquidator of each participating group member, as the case may be.

(4) The committee of creditors or liquidator, of each participating group member, as the case may be, shall within 30 days of receipt of the group strategy decide whether or not to approve the group strategy circulated under sub-clause (3), and such decision shall be communicated to the group coordinator in writing in such form and manner as may be specified.

(5) If a participating group member fails to approve a group strategy within the stipulated period of 30 days under sub-clause (4), such participating group member shall be deemed to have rejected the group strategy.

(5) An approval of a group strategy by a committee of creditors of a participating group member, under sub-clause (4), shall require a vote in favour of such an approval by at least sixty-six percent of its voting shares.

(6) The group coordinator shall inform the resolution professionals or liquidators of all participating group members, as the case may be, of the decision or the failure to approve a group strategy, as the case may be, of each participating group member within three days of receiving such communication.

(7) Once a group strategy has been approved by the committee of creditors or liquidators of all participating group members under sub-clause (4), it shall

(a) be binding on them and all other parties to the group strategy; and

(b) not be challenged before the Adjudicating Authority on any ground, except fraud or that the process followed for its approval violated the provisions of the Code.

Provided that parties to a group strategy shall be permitted to make revisions to it in the manner agreed thereunder.

(8) A group coordinator may apply to the Adjudicating Authority for suitable directions and orders if a party to the group strategy fails to comply with the terms agreed by it thereunder.

(9) The group coordinator shall file a copy of the group strategy, once it has been approved by the committee of creditors or liquidators of all participating group members under sub-clause (4), with the Adjudicating Authority, within three days of such approval.

Illustration

Company A, B, C, D and E are part of a group. B,C, and D are undergoing a corporate insolvency resolution process and E is undergoing a liquidation process under the Code. A group coordination proceeding is opened in which B, C, D and E are all participating. A group strategy shall be approved if –

i. *the committee of creditors of Company B approves the group strategy by a vote of at least 66% of its voting shares;*
ii. *the committee of creditors of Company C approves the group strategy by a vote of at least 66% of its voting shares;*
iii. *the committee of creditors of Company D approves the group strategy by a vote of at least 66% of its voting shares; and*
iv. *the liquidator of Company E approves the group strategy.*

10. **Termination of group coordination proceedings.**

(1) The Adjudicating Authority shall order the termination of a group coordination proceeding if the group coordinator appointed in such proceeding requests so on any of the following grounds:

(a) if the group strategy approved by the participating group members, under Clause 9, has been fully implemented; or

(b) if the committees of creditors and liquidators of participating group members, as the case may be, have agreed to such termination in such manner as may be specified; or

(c) if the committees of creditors and liquidators fail to approve a group strategy and the group coordinator is of the opinion that it is not feasible for participating group members to agree on a group strategy.

(2) Any costs incurred by the group coordinator in conducting the group coordination proceeding shall form a part of the insolvency resolution process costs or liquidation costs, as the case may be, of the participating group members.

(3) The costs under sub-clause (3) shall be borne by the participating group members in such manner as may be specified.

11. **Addition in timeline.**

Notwithstanding anything contained in Section 12, when a group member, undergoing the corporate insolvency resolution process, participates in the group coordination proceeding, the Adjudicating Authority shall, by order, extend the duration of the corporate insolvency resolution process of that group member, by an additional period of ninety days:

Provided that, any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

Explanation: It is hereby clarified that the extension of time-period provided under this clause shall be in addition to the time-period for completion of corporate insolvency resolution process provided under Section 12, along with any extension granted thereunder.

CHAPTER III

FACILITATING COOPERATION AND COMMUNICATION

12. Filing of joint application and Adjudicating Authority for the group.

(1) An application to initiate a corporate insolvency resolution process under Section 7, 9 or 10 may be filed jointly in respect of two or more corporate debtors who belong to the same group, along with such form and fee as may be prescribed.

Explanation: It is clarified that a joint application for the initiation of a corporate insolvency resolution process shall not, by itself, lead to the commencement of a group coordination proceeding.

(2) Notwithstanding anything to the contrary contained in sub-section (1) of Section 60, an application under sub-clause (1) may be filed in a National Company Law Tribunal having territorial jurisdiction over the place where the registered office of any of the corporate debtors under sub-clause (1) is located.

(3) Notwithstanding anything to the contrary contained in this Code and without prejudice to sub-clause (2), where an application for initiation of a corporate insolvency resolution process under Section 7, 9 or 10 in respect of a corporate debtor has been admitted by a National Company Law Tribunal, -

(a) all pending applications in respect of corporate debtors belonging to the same group in any other National Company Law Tribunal shall stand transferred to such National Company Law Tribunal;

(b) an application relating to the corporate insolvency resolution or liquidation process in respect of a corporate debtor belonging to the same group shall be filed before such National Company Law Tribunal; and

(c) an application for initiation of group coordination proceeding under Clause 3, in respect of corporate debtors belonging to the same group, shall be filed before such National Company Law Tribunal.

13. Communication and cooperation.

(1) A resolution professional or liquidator shall, extend all assistance and cooperation, to-

(a) resolution professionals or liquidators of group members of the corporate debtor he represents; and

(b) the group coordinator appointed in respect of a group coordination proceeding, if any,

as may be required by them to enable coordination of the insolvency proceedings of such group members.

(2) A resolution professional or liquidator shall be entitled to-

(a) communicate and request information or assistance directly from resolution professionals and liquidators appointed in respect of group members; and

(b) communicate and request information or assistance directly from the group coordinator appointed in respect of a group coordination proceeding, if any.

(3) The committees of creditors and group committee of creditors, if any, of corporate debtors belonging to the same group shall extend all assistance and cooperation to each other, as may be necessary to enable coordination of the insolvency proceedings of such group members.

CHAPTER IV

MISCELLANEOUS

14. Appeals to the National Company Law Appellate Tribunal.

(1) Notwithstanding anything to the contrary contained in the Companies Act, 2013 (18 or 2013), any person aggrieved by an order of the Adjudicating Authority under this Part may prefer an appeal before the National Company Law Appellate Tribunal.

(2) Every appeal under sub-clause (1) shall be filed within a period of thirty days from the date of receipt of the order, before the National Company Law Appellate Tribunal:

Provided that the National Company Law Appellate Tribunal may entertain an appeal filed after the expiry of the said period of thirty days, if it is satisfied that there was a sufficient cause for not filing the appeal in time, provided such period of delay has not exceeded fifteen days.

15. Appeals to the Supreme Court.

(1) Any person aggrieved by an order of the National Company Law Appellate Tribunal under this Part may file an appeal before the Supreme Court on a question of law arising out of such order under this Code within a period of forty-five days from the date of receipt of such order.

(2) The Supreme Court may, if it is satisfied that a person was prevented by sufficient cause from the filing of an appeal within forty-five days, entertain an appeal filed within a further period not exceeding fifteen days.

List of Abbreviations

S. No.	Term	Abbreviation/ Reference
1.	Committee of creditors	CoC
2.	Corporate insolvency resolution process	CIRP
3.	EU Regulation 2015/848 on Insolvency Proceedings (recast)	EU Regulations
4.	Insolvency and Bankruptcy Code, 2016	Code/ IBC
5.	Insolvency and Bankruptcy Board of India	IBBI
6.	Ministry of Corporate Affairs	MCA
7.	National Company Law Appellate Tribunal	NCLAT
8.	National Company Law Tribunal	NCLT
9.	UNCITRAL Legislative Guide to Insolvency Law Part 3	UNCITRAL Legislative Guide
10	UNCITRAL Model Law on Cross Border Insolvency	MLCBI
11	UNCITRAL Model Law on Enterprise Group Insolvency	MLEGI
12	Working Group on Group Insolvency (under Chairmanship of Mr. U. K. Sinha)	Working Group