



INDIAN JOURNAL OF
LEGAL REVIEW

VOLUME 5 AND ISSUE 5 OF 2025

INSTITUTE OF LEGAL EDUCATION



INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN – 2583-2344

(Open Access Journal)

Journal's Home Page – <https://ijlr.iledu.in/>

Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>

Volume 5 and Issue 5 of 2025 (Access Full Issue on – <https://ijlr.iledu.in/volume-5-and-issue-5-of-2025/>)

Publisher

Prasanna S,

Chairman of Institute of Legal Education

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

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A COMPREHENSIVE LEGAL ANALYSIS OF GROUP INSOLVENCY: NAVIGATING THE COMPLEXITIES OF CORPORATE DISTRESS IN INTERCONNECTED ENTITIES

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BEST CITATION – ADITYA KUMAR SINHA & DR. PARISHKAR SHRESHTH, A COMPREHENSIVE LEGAL ANALYSIS OF GROUP INSOLVENCY: NAVIGATING THE COMPLEXITIES OF CORPORATE DISTRESS IN INTERCONNECTED ENTITIES, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 5 (5) OF 2025, PG. 675-684, APIS – 3920 – 0001 & ISSN – 2583-2344.

Abstract

The increasing prevalence of corporate groups and their intricate web of interdependencies presents unique challenges for insolvency law. This paper undertakes a comprehensive legal analysis of group insolvency, delving into the complexities arising from the financial distress of interconnected entities. It examines the limitations of traditional entity-centric insolvency frameworks in addressing the systemic risks and contagion effects inherent in group structures.

This analysis explores various legal approaches to group insolvency, including procedural coordination, substantive consolidation, and modified universalism, evaluating their effectiveness in balancing the interests of diverse stakeholders – including creditors, shareholders, employees, and the wider economy. The paper critically assesses the legal and practical hurdles associated with each approach, considering issues such as jurisdictional conflicts, the treatment of intercompany claims, the preservation of enterprise value, and the fair distribution of assets. Furthermore, this research investigates emerging trends and potential reforms in group insolvency law across different jurisdictions. It analyzes legislative developments, judicial pronouncements, and evolving best practices aimed at providing more coherent and efficient mechanisms for resolving the insolvency of corporate groups. By synthesizing existing legal frameworks and identifying areas for improvement, this paper contributes to a deeper understanding of the legal complexities surrounding group insolvency and offers insights for policymakers, practitioners, and academics seeking to navigate the intricate landscape of corporate distress in interconnected entities.

KEYWORDS – Group Insolvency, legal frameworks, stakeholders, judicial precedents

Introduction: The Ascendancy of Group Insolvency in a Globalized Economy

The relentless march of globalization and the intricate tapestry of modern corporate structures have ushered in an era where business entities increasingly operate not as isolated islands, but as interconnected networks of subsidiaries, holding companies, and

affiliates. This intricate web of interdependencies, while fostering synergistic growth and operational efficiencies during periods of economic prosperity, presents a formidable challenge when financial distress befalls one or more entities within the group. The phenomenon of "group insolvency³," wherein a constellation of related companies

faces financial collapse, has thus emerged as a critical area of legal inquiry, demanding a departure from the traditional paradigms of single-entity insolvency law.

The inherent complexities of group insolvency stem from the intricate web of inter-company transactions, guarantees, cross-collateralization, and shared resources that bind these entities together. When financial turbulence strikes, the ripple effects can cascade across the entire group, blurring the lines of individual corporate identity and necessitating a holistic approach to resolution. Traditional insolvency frameworks, meticulously crafted to address the discrete failure of a single legal entity, often prove inadequate in navigating the intricate web of interconnected liabilities, conflicting creditor interests, and the potential for value destruction inherent in group insolvencies⁴.

This comprehensive legal analysis seeks to delve into the multifaceted landscape of group insolvency, dissecting the unique challenges it presents, scrutinizing the existing legal frameworks across various jurisdictions, and exploring potential pathways toward more efficient and equitable resolution mechanisms. The paper will embark on a detailed examination of the inherent complexities arising from inter-company relationships, the jurisdictional hurdles encountered in cross-border group insolvencies, the intricate dynamics of creditor coordination, and the critical imperative of preserving group value while ensuring fair distribution among stakeholders.

Furthermore, it will critically evaluate the efficacy of current legal approaches, including coordinated proceedings, the enactment of specific group insolvency legislation, the application of international protocols, and the role of judicial cooperation in navigating this intricate legal terrain⁵. Ultimately, this analysis aims to contribute to the ongoing discourse surrounding group insolvency, proposing potential avenues for reform and the

development of best practices that can better equip legal systems to address the challenges posed by corporate distress within interconnected entities in an increasingly globalized world.

The Insolvency and Bankruptcy Code ('Code') provides detailed provisions to deal with the insolvency of a corporate debtor on a standalone basis, it does not envisage a framework to either synchronize insolvency proceedings of different corporate debtors in a group or resolve their insolvencies together. 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 the insolvency resolution of some corporate debtors special issues arose from their interconnections with other group companies. While the Code is silent about group insolvency, the courts are trying to fill in this lacuna through judicial pronouncements.

Group Insolvency can be tackled by either Procedural Coordination or Substantive Consolidation. The process of procedural coordination is what the Indian courts have adopted in most group insolvency cases that have been tackled.

The Insolvency and Bankruptcy Board of India ('IBBI') constituted a Working Group on Group Insolvency on January 17, 2019, which submitted its recommendations for the framework of the procedure of group companies as 'Report of the Working Group on Group Insolvency' on September 23, 2019.⁶

I. Unraveling the Complexities: The Unique Challenges of Group Insolvency

The specter of group insolvency casts a long shadow, distinct from the more familiar landscape of single-entity failure. The interconnected nature of corporate groups introduces a panoply of complexities that demand a nuanced and sophisticated legal response.⁷

A. The Tangled Web of Inter-Company Transactions and Guarantees:

At the heart of many corporate groups lies a dense network of inter-company transactions. These can manifest as loans extended between subsidiaries, the provision of goods and services across the group, centralized treasury functions, and the strategic pooling of resources. While these intra-group dealings can optimize efficiency and facilitate internal financing during prosperous times, they become significant impediments during insolvency. Determining the validity and priority of inter-company claims becomes a Gordian knot⁸, often requiring a meticulous tracing of funds and a careful assessment of the arm's length nature of these transactions. Furthermore, the prevalence of cross-guarantees, where one group entity guarantees the obligations of another, can trigger a domino effect of liability, potentially dragging otherwise solvent entities into the insolvency vortex. Untangling these complex financial interdependencies and establishing a fair hierarchy of claims among group entities and external creditors poses a significant legal and practical challenge.

B. Navigating the Labyrinth of Cross-Border Insolvency:

In an increasingly globalized economic landscape, corporate groups often span multiple jurisdictions, holding assets and incurring liabilities across national borders. This international dimension introduces a layer of profound complexity to group insolvency proceedings. The divergence in national insolvency laws, procedural rules, and creditor rights regimes creates a fragmented legal landscape that can impede the efficient and coordinated resolution of the group's financial distress⁹.

Identifying the appropriate jurisdiction for the main insolvency proceeding, ensuring recognition and enforcement of foreign insolvency orders, and coordinating the actions of insolvency administrators across different legal systems become paramount. The

potential for forum shopping by debtors or creditors, the challenges of cross-border asset tracing and recovery, and the need to reconcile conflicting legal principles necessitate robust mechanisms for international cooperation and harmonization.

C. The Discord of Conflicting Creditor Interests:

The insolvency of a corporate group invariably involves a multitude of creditors, each with their distinct interests and priorities. Within the group itself, the creditors of different entities may find their interests diverging. For instance, the creditors of a highly profitable subsidiary may object to a restructuring plan that prioritizes the survival of a struggling parent company at their expense¹⁰. External creditors, such as secured lenders to specific subsidiaries, may clash with unsecured creditors of the holding company or other group entities.

D. Preserving Group Value Amidst Financial Distress:

The inherent value of a corporate group often lies not in the sum of its parts, but in the synergistic relationships and operational efficiencies that arise from their interconnectedness. During insolvency proceedings, a piecemeal liquidation of individual entities can lead to a significant destruction of this "group value," dissipating the potential for a more favorable outcome for all stakeholders. Legal frameworks must therefore strive to facilitate restructuring solutions that recognize and preserve these synergies, allowing for the continuation of viable parts of the group as a going concern.¹¹ This may involve the implementation of group restructuring plans, the transfer of assets and operations between group entities, and the negotiation of compromises that take into account the interconnected nature of the group's business.

E. The Logistical Hurdles of Administration and Coordination:

Managing the insolvency of multiple related entities simultaneously presents significant logistical and administrative challenges. The

appointment of multiple insolvency administrators across different jurisdictions, the need to coordinate their actions, the potential for conflicting instructions, and the increased administrative costs associated with parallel proceedings can impede efficiency and prolong the resolution process¹². Establishing clear lines of communication, defining the roles and responsibilities of different administrators, and implementing effective mechanisms for information sharing and joint decision-making are crucial for streamlining the administration of group insolvency cases.

Regulation under Current Insolvency and Bankruptcy Code 2016

The provisions provide that the insolvency proceedings of a debtor company and its guarantor would be dealt with by the same Adjudicating Authority. This may also enable the linking of proceedings in those cases where the debtor and guarantor are part of the same group of companies.¹³

(Liquidation Estate) gives control of the shares of the subsidiary to the resolution professional and liquidator of the parent company. Further, a resolution plan of a parent company would deal with the assets of the company, which could include its shares in subsidiary companies. A successful resolution applicant could also receive control of these securities.¹⁴

The Code defines related parties to corporate debtors to inter alia include holding-subsidiary companies, companies in which directors or managers have shareholding, companies controlling each other by contracts, companies with whom there may be a de facto association in the form of participation in the policy-making process, interchange of employees, etc.¹⁵

The Code avoids perverse behavior, longer time limits are prescribed for the application of avoidance provisions in case of transactions with related persons, and prohibitions in section 21 target the ability of related parties to vote as part of the CoC. Even transactions with related

parties during the insolvency resolution period require approval of the CoC by section 28.¹⁶

Section 29(j) of the Code To avoid perverse behavior, longer time limits are prescribed for the application of avoidance provisions in case of transactions with related persons, and prohibitions in sections 29A target the ability of related parties to submit a plan for the resolution of the company.¹⁷

II. A Comparative Analysis: Navigating the Legal Landscape Across Jurisdictions

The legal response to group insolvency varies significantly across different jurisdictions, reflecting diverse legal traditions, economic priorities, and approaches to corporate governance. Examining these different frameworks provides valuable insights into the strengths and weaknesses of various approaches.

A. The United States: Substantive Consolidation and Chapter 11 Flexibility:

The United States, with its well-developed bankruptcy code under Chapter 11, offers a relatively flexible framework for addressing group insolvency. The doctrine of "substantive consolidation," although applied cautiously, allows courts to pool the assets and liabilities of related entities when their affairs are inextricably intertwined and the separate corporate identities have been disregarded to the detriment of creditors. Chapter 11 also provides a platform for the development and implementation of comprehensive reorganization plans that can encompass multiple entities within a group, allowing for the restructuring of inter-company debt and the preservation of group value. However, the application of substantive consolidation remains discretionary and fact-specific, leading to potential uncertainty.

B. The United Kingdom: Administration and Scheme of Arrangement:

The United Kingdom offers tools such as administration and the scheme of arrangement that can be utilized in group insolvency

scenarios. Administration provides a moratorium on creditor actions, allowing administrators to formulate and implement restructuring plans for one or more entities within a group. Schemes of arrangement offer a flexible mechanism for reaching compromises with creditors across multiple group companies, subject to court approval. The UK has also seen increasing judicial willingness to cooperate in cross-border insolvency matters, facilitating the coordination of proceedings involving international corporate groups¹⁸.

C. The European Union: The European Insolvency Regulation:

The European Insolvency Regulation (EIR)¹⁹ provides a framework for cross-border insolvency proceedings within the EU member states. While primarily focused on single-entity insolvency with assets or creditors in multiple member states, the EIR's principles of recognition and cooperation can be relevant in group insolvency cases involving EU-based entities. However, the EIR does not provide specific rules for the substantive consolidation of group entities or the coordination of multiple main proceedings.²⁰

D. Developing Jurisdictions: Evolving Frameworks:

Many developing jurisdictions are still grappling with the complexities of group insolvency, often relying on traditional insolvency laws that are ill-equipped to handle the interconnectedness of corporate groups. Some jurisdictions are beginning to introduce specific provisions or adapt existing laws to address group insolvency, drawing inspiration from more established frameworks. However, the lack of specific legislation and judicial experience in this area can pose significant challenges.

E. The UNCITRAL Model Law on Cross-Border Insolvency:

The UNCITRAL Model Law on Cross-Border Insolvency, adopted by numerous jurisdictions, provides a framework for facilitating cooperation between courts and insolvency

administrators in different countries. While not specifically designed for group insolvency, its principles of recognition of foreign proceedings, access for foreign representatives, and cooperation between courts can be invaluable in cross-border group insolvency cases.²¹

III. Charting a Course Forward: Potential Approaches for Effective Group Insolvency Resolution

The inherent complexities of group insolvency necessitate a continuous evolution of legal frameworks and the adoption of innovative approaches to ensure efficient, equitable, and value-preserving resolutions.

A. The Imperative of Legal Framework Harmonization:

The significant disparities in group insolvency laws and procedures across jurisdictions pose a major impediment to the seamless resolution of cross-border group distress. Greater harmonization of legal frameworks, particularly in areas such as the recognition of foreign insolvency proceedings, the treatment of inter-company claims, and the principles governing substantive consolidation, would significantly enhance the efficiency and predictability of cross-border group insolvency resolutions. International bodies like UNCITRAL can play a crucial role in promoting the adoption of model laws and best practices in this area²².

B. Establishing Robust Coordination Mechanisms:

Effective coordination among insolvency administrators and courts in different jurisdictions is paramount in group insolvency cases²³. This necessitates the establishment of clear communication channels, the development of protocols for information sharing, and the willingness of courts to cooperate in recognizing and supporting parallel proceedings. The appointment of a lead administrator or the formation of coordination committees involving administrators from different jurisdictions can facilitate a more

cohesive and streamlined approach to managing the group's insolvency.

C. Embracing Group Restructuring Plans:

Legal frameworks should explicitly facilitate the development and implementation of comprehensive group restructuring plans that address the financial distress of the entire group in a coordinated manner. These plans should provide mechanisms for the restructuring of inter-company debt, the transfer of assets and operations between group entities, and the negotiation of compromises with creditors across group²⁴. Judicial oversight and the application of fairness principles are crucial to ensure that such plans are equitable and do not unfairly prejudice any class of stakeholders²⁵.

D. Clarity in the Treatment of Inter-Company Claims:

The treatment of inter-company claims remains a contentious issue in group insolvency. Clear and predictable rules are needed to determine the validity, priority, and voting rights of these claims. Approaches such as equitable subordination, which allows courts to adjust the priority of claims based on the conduct of the claimant, may be relevant in addressing situations of abuse or unfair advantage within the group. However, the application of such doctrines should be guided by clear legal principles to ensure predictability and avoid arbitrary outcomes.²⁶

E. Fostering Judicial Expertise and Cooperation:

The complexities of group insolvency demand a high level of judicial expertise and a willingness to engage in cross-border judicial cooperation. The establishment of specialized insolvency courts or the training of judges in the intricacies of group insolvency law can enhance the quality of judicial decision-making.²⁷ Furthermore, fostering a culture of judicial cooperation through regular communication, the development of judicial protocols, and participation in international judicial forums can

facilitate the smooth coordination of cross-border proceedings.

F. The Role of Technology and Information Sharing:

In an increasingly digital age, technology can play a significant role in enhancing the efficiency and transparency of group insolvency proceedings. Secure online platforms for information sharing among administrators, creditors, and courts can improve communication and facilitate better-informed decision-making²⁸. The use of data analytics and artificial intelligence tools can also assist in analyzing complex financial data and identifying potential restructuring solutions.

IV. Precedents settled by the adjudicating authority and Indian Courts

Indian courts have played a pivotal role in shaping the jurisprudence around group insolvency. However, the establishment of a comprehensive legislative framework is essential to provide clarity and consistency in resolving insolvencies involving corporate groups. Despite these judicial developments, India lacks a formal legislative framework for group insolvency. The resolution of group insolvencies currently relies on judicial interpretations and adaptations from practices in jurisdictions like the United States and the United Kingdom. The absence of codified provisions leads to inconsistencies and uncertainties in handling complex insolvency cases involving corporate groups.

The plea taken in the case was that "simultaneous 'Corporate Insolvency Resolution Processes' should continue against them under the guidance of same 'Resolution Professional'." It was submitted that the land of all corporate debtors should be taken over by the same Resolution Professional and consolidated Resolution Plans should be invited to keep the company as a going concern. NCLAT held that "The Adjudicating Authority will admit the applications under Section 7 filed by 'Edelweiss Asset Reconstruction Company Limited' against

'SachetInfrastructure Pvt. Ltd.;; 'Magad Realtors Pvt. Ltd.;; 'MehakRealtech Pvt. Ltd.;; 'Sameeksha Estate Pvt. Ltd.' and 'JamvantEstates Pvt. Ltd.' and appoint the 'Resolution Professional' of 'Adel Landmarks Limited'- (Developer) ('Principal Borrower')as common 'Resolution Professional' to ensure that the 'Corporate Insolvency Resolution Process' against 'Adel Landmarks Limited'- ('Corporate Debtor') proceed jointly and 'Information Memorandum' is prepared in a manner that the 'Residential Plotted Colony' at village Palwal at Sectors 8 & 9 in terms of the License No. 46 of 2009 and License No. 53 of 2009, is completed in one go by initiating a consolidated 'Resolution Plan(s)' for total development²⁹."

In the other matter When the Videocon Group³⁰ went insolvent, fifteen different resolution applications were filed against its fifteen different group companies.". The Principal Bench of the National Company Law Tribunal ("NCLT") ordered that all the matters regarding the insolvency resolution processes of these different companies be dealt with by the same bench of the NCLT for "avoiding conflicting orders and facilitating the hearing" of these matters. The Adjudicating Authority ordered on 08.08.2019 that the assets and liabilities of 13 Videocon companies should be substantively consolidated due to common control, common directors, common assets, common liabilities, interdependence, interlacing of finance, co-existence for survival, pooling of resources, intertwined accounts, interloping of debts, singleness of economics of units, common financial creditors and common group of corporate debtors. The 13 Corporate Debtors were looked at as one economic unit on account of various inter-linkages, and consolidated CIRP was undertaken. The Corporate Debtor Group combined and thus, one committee of creditors for all 13 Corporate Debtors was constituted. The Videocon case is a classic example of group insolvency carried by the courts in India.

In the case of the Lanco Group³¹, wherein while the parent company (i.e. Lanco Infratech

Limited) was undergoing CIRP, the subsidiaries including the operational companies were not part of the CIRP initially, which resulted in the liquidation of Lanco Infratech Limited due to lack of response by the bidders in the CIRP of Lanco Infratech Limited.

V. Recommendation of IBBI Board

The Insolvency and Bankruptcy Board of India ('IBBI') constituted a Working Group on Group Insolvency on January 17, 2019, which submitted its recommendations for the framework of the procedure of group companies as 'Report of the Working Group on Group Insolvency' on September 23, 2019³². The recommendations cover the framework for companies at the insolvency resolution as well as the liquidation stage.

Key observations and recommendations of the Working Group include- Recommended the definition of 'corporate group' which includes holding, subsidiary, and associate companies.

Elements of the proposed framework may include:

- (i) a joint application against all corporate debtors who have defaulted and are part of a group,
- (ii) a single insolvency professional and a single adjudicating authority (to reduce litigation and other costs, and save time),
- (iii) creation of a group creditors' committee,
- (iv) communication, cooperation, and information sharing among all various members, and
- (v) group coordination proceedings.

Conclusion: Towards a More Coherent and Effective Legal Framework for Group Insolvency

Group insolvency represents a significant challenge to traditional insolvency law, demanding a paradigm shift towards more holistic and coordinated approaches. The interconnected nature of modern corporate groups necessitates legal frameworks that

recognize these interdependencies, facilitate cross-border cooperation, and prioritize the preservation of group value while ensuring equitable treatment of all stakeholders.

The current patchwork of legal approaches across jurisdictions highlights the urgent need for greater harmonization, the establishment of robust coordination mechanisms, and the development of specific legal tools tailored to the unique challenges of group insolvency. Embracing group restructuring plans, clarifying the treatment of inter-company claims, fostering judicial expertise and cooperation, and leveraging the power of technology are crucial steps toward building a more coherent and effective legal framework for navigating the complexities of corporate distress within interconnected entities in an increasingly globalized world.

The ongoing dialogue and collaboration among legal scholars, policymakers, and insolvency practitioners are essential to refine existing frameworks and develop innovative solutions that can better address the multifaceted challenges of group insolvency. By embracing a more nuanced and coordinated approach, legal systems can better safeguard the interests of creditors, preserve economic value, and promote greater stability in the global financial landscape when faced with the intricate web of corporate distress within interconnected entities. The future of effective group insolvency resolution lies in the continued pursuit of legal innovation, international cooperation, and a deep understanding of the intricate dynamics that define the modern corporate landscape.

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INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]

VOLUME 5 AND ISSUE 5 OF 2025

APIS – 3920 – 0001 (*and*) ISSN – 2583-2344

Published by
Institute of Legal Education

<https://iledu.in>

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