

Ordering International Group Insolvency: *Lex Lata* and *Lex Ferenda*

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ORDERING INTERNATIONAL GROUP INSOLVENCY: *LEX LATA* AND *LEX FERENDA* INTRODUCTION & PLAN OF PRESENTATION

- Problem Statement
- Understanding 'Enterprise Group', 'Enterprise Group Insolvency' & 'International Group Insolvency'
- *Lex Lata* Governing Group Insolvency
- Soft Law bridging between *Lex Lata* & *Lex Ferenda*
- The Place of Cooperation, Coordination, Negotiation, Harmonisation, Comity etc. in Group Insolvency
- Assessing Harm, Attributing Liability and Determining Causation in Group Insolvency
- *Lex Ferenda*- Progressive Development Towards the Group Insolvency Law

PROBLEM STATEMENT

- Multinational business groups have emerged as faceless behemoths in our liberalised society. These enterprise groups have become integral to the economy and reserve the power to negotiate justice by existing as separate legal entities independent of their enterprise group.
- It is argued that the singular/independent insolvency resolution process impacts adversely of the cumulative impact on all jurisdictions. The public policy/ public interest outweighs legal interest in the protection of the corporate veil as against the function of law to cumulatively address the problem of group insolvency equitably and fairly.
- The independent insolvency resolution for each enterprise group member adds up huge transaction costs without providing equitable relief to the creditors and other stakeholders.
- The detrimental ‘acts of insolvency’ in lieu of the corporate veil need to be checked by assessing harm, determining causation and attributing liability to the State and Private Actor(s).
- The plurality of legal systems, evolving business structures, and international trade complexities demand uniformity/harmonisation in private international law rules, allowing for a principled/ fair resolution of international group insolvency.
- The problem should be analysed in view of the confluence of Public and Private International law with objective global governance of international group insolvency in a transnational setting.

UNDERSTANDING 'ENTERPRISE GROUP', 'ENTERPRISE GROUP INSOLVENCY' & 'INTERNATIONAL GROUP INSOLVENCY'

Enterprise groups are not just economic convenience but a strategic reality consciously created to leverage common tangible and intangible assets.

- **So what constitutes an 'Enterprise Group'?**

Factors such as control, ownership, operational and financial dependencies, shared intellectual property rights, etc., are considered in characterising a "enterprise group."

- **Navigating 'Enterprise Group Insolvency'**

The term "enterprise group insolvency" is employed to address the complex interplay of consolidated insolvency of independent entities within a single economic unit. Enterprise group insolvency is triggered with the initiation of the insolvency process of one or more enterprise group members.

- **When is it called 'International Group Insolvency'?**

If the enterprise group operates in more than one jurisdiction.

LEX LATA GOVERNING GROUP INSOLVENCY

In India, the Insolvency & Bankruptcy Code, 2016, is silent on the administration of enterprise groups' insolvency resolution/ liquidation proceedings. Yet, there is growing jurisprudence of group insolvency through precedents. (Cross Border Insolvency Resolution Committee Report on Group Insolvency)

The possible treatments for Enterprise Group Insolvency

- Substantial consolidation of insolvency resolution/ liquidation proceedings.

Owens Corning, 419 F.3d 195 (3d Cir. 2005); State Bank of India v. Videocon Industries Limited & Ors.

- Procedural consolidation of insolvency resolution/ liquidation proceedings.

In Re Lehman Brothers Holding Inc.; Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd. (Principal Borrower) & 8 Other CDs- Corporate Guarantors)

- Piercing of the corporate veil for equitable insolvency resolution/ liquidation proceedings.

In Re Enron Corp; ArcelorMittal India Private Limited v. Satish Kumar Gupta and Others [(2019) 2 SCC 1].

SOFT LAW BRIDGING BETWEEN *LEX LATA* & *LEX FERENDA*

The **UNCITRAL Model Law on Enterprise Group Insolvency** unifies and harmonises *Lex Ferenda* in relation to enterprise group insolvency. It applies to enterprise groups where insolvency proceedings have commenced for one or more of its members.

- Addresses the conduct and administration of those insolvency proceedings.
- Promotes cooperation between those insolvency proceedings of this State and foreign States involved.
- Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;
- Fair and efficient administration of insolvencies concerning enterprise group members that protects the interests of all creditors of those enterprise group members and other interested persons, including the debtors;
- Protection and maximisation of the overall combined value of the assets and operations of enterprise group members affected by insolvency and of the enterprise group as a whole.

THE PLACE OF COOPERATION, COORDINATION, NEGOTIATION, HARMONIZATION, COMITY, ETC. IN GROUP INSOLVENCY

- The **UNCITRAL Model Law on Enterprise Group Insolvency** advocates cooperation and coordination between the State and its foreign counterpart in the administration of insolvency proceedings.
- The cooperation and coordination in group insolvency is achieved through the ‘Negotiation of Agreements’ and adequate disclosure of information.
- The States that have adopted the Model Law realise international cooperation and harmonisation of insolvency law to have equitable outcomes of insolvency proceedings.
- For maximizing the value of assets and the return to the creditors the spirit of cooperation must be guided by comity.

In Re Maxwell Communications Corp (93 F 3d 1036 2d Cir (1996))

ASSESSING HARM, ATTRIBUTING LIABILITY AND DETERMINING CAUSATION IN GROUP INSOLVENCY

- There should be Ex-Ante regulations and equitable remedies to prevent ‘acts of insolvency’ and thereby prevent harm.
- There should be transparency in the disclosure of transactions that can harm the interests of creditors and other stakeholders.
- Attribution of liabilities for the lack of due diligence may be on the State and/or enterprise group and/ or its members thereof.
- The rules of causation must determine the extent to which the insolvency is attributable to the actions of the related group enterprise member.

LEX FERENDA- PROGRESSIVE DEVELOPMENT TOWARDS THE GROUP INSOLVENCY LAW

- The law ought to be must seek global governance of international group insolvency through the confluence of public and private international law to have an equitable and fair insolvency resolution irrespective of the jurisdiction of insolvency proceedings.
- The fragmented bilateral and multinational treaty must be consolidated and informed by the rules of private international law.
- There should be an ex-ante regulation of standard of review, assessing harm, attributing liability and determining causation for the detrimental acts of insolvency.
- The international cooperation, as guided by comity, should be sought for adequate disclosure and sharing of information by the States and the enterprise group.
- There should be a provision for amicable settlement of disputes in group insolvency.
- Information and Communication Technology must inform the procedure of conducting and administering group insolvency.



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Thank You

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