



BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

Insolvency and Cross-border Groups.
UNCITRAL Recommendations for a European Perspective?

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FOREWORD

The importance of improving coordination in the management of insolvency within business groups is widely recognized. The awareness of the high costs associated with inefficient resolution of group crises, especially when groups have cross-border ramifications and coordination is more difficult, has increased in the wake of the financial crisis. This has induced policy makers and international institutions to investigate what reforms are needed to ensure that the benefits of the group structure are not frustrated upon occurrence of insolvency.

The treatment of group insolvencies is particularly relevant in the banking sector and is in the agenda of banking regulators both at the international and European level. We believe that a comparative discussion on the main issues at stake among experts coming from different legal environments may provide useful elements also to improve the debate on how to deal with banking groups' crises.

On 11 June 2010 Banca d'Italia organized an international seminar on insolvency of cross-border groups at its premises in Rome. The aim of the seminar was to discuss and raise awareness of the current debate taking place both at the EU and International level on the treatment of enterprise groups in insolvency. Taking into account the Uncitral draft recommendations on the "Treatment of enterprise groups in insolvency" (which were approved the following 21 July and adopted as part three of the Legislative Guide on Insolvency), and the recent developments in the application of EC Regulation n. 1346/2000, the seminar intended to open-up a dialogue among European experts on the need for, and envisaged features of, a coordinated framework for the management of distressed multinational groups.

We present here the contributions delivered by the Seminar participants. The participants were lawyers, bankers and university professors who, in their different capacities, are involved in the study of bankruptcy issues. Some of them had also taken an active role in the drafting of the Uncitral recommendations, as members of State delegations within Uncitral Group V.

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AUTHORS:

Anna Maria TARANTOLA

Deputy Director general of Banca d'Italia – Member of the Directorate

Alberto MAZZONI

*Professor of Commercial Law and International Trade Law;
Università Cattolica del Sacro Cuore di Milano*

Christoph G. PAULUS

Professor of Law; Humboldt University at Berlin

Juan SÁNCHEZ CALERO

Catedrático de Derecho Mercantil; Universidad Complutense de Madrid

Mónica FUENTES NAHARRO

Profesora Contratada Doctor; Universidad Complutense de Madrid

Magda BIANCO

Structural Economic Analysis Department; Banca d'Italia

Monica MARCUCCI

Legal Department; Banca d'Italia

Irit MEVORACH

Lecturer in Law; University of Nottingham

Rodrigo RODRIGUEZ

*Assistant Professor; Institute for Private International Law and Civil Procedure;
University of Berne*

Massimo V. BENEDETTELLI

Professor of International Law; Università di Bari

OPENING REMARKS

Anna Maria Tarantola

Good morning ladies and gentlemen and welcome to the Bank of Italy.

I am pleased to introduce today's seminar which will address a crucial question: how should the new regulatory framework deal with group insolvency? The financial crisis has brought to the fore this critical issue.

The unprecedented distress we are experiencing in financial systems and the collateral damage to the real economy underscore the urgent need for effective insolvency regimes to adequately manage business failures and contain their spill-over effects.

The global dimension of the financial crisis has made evident the real risk of disruption and contagion in the markets when large, complex, multinational financial institutions become insolvent. This crisis has also revealed the inadequacy of the current regulatory framework to deal with such risks.

The crisis has also shown that although many firms are international in structure and modus operandi, when they fail they are subject to national, single legal-entity insolvency rules; and these rules vary substantially from country to country.

This is true not only world-wide but within the EU itself and it affects both financial and non-financial enterprises.

We need to harmonize insolvency procedures - something which the existing EC regulations and directives have so far failed to do. What is more, they do not address the issue of groups. This makes any coordinated handling of insolvency between a parent company and its subsidiaries almost impossible.

The importance of establishing a robust international framework capable of managing multinational financial group failures is now widely recognised.

Debate has been raised on the role of legally binding crisis management regimes as opposed to the more flexible, principle-based arrangements which have proved to be largely ineffective in the recent turmoil.

Whatever regulatory instruments come into being in the future, it is generally accepted that they should accomplish at least two main objectives:

- ensure coordination of the reorganization/resolution procedures for all entities within a group;
- promote the convergence of national insolvency regimes at least with regard to fundamental mechanisms and principles essential to cross-border coordination.

It is also widely agreed that the new regulatory framework must embrace the principle that private-sector solutions be sought wherever possible. There should be no expectation that the cost of failure will be born by the State and its taxpayers.

All these issues are currently being studied as part of a broader agenda on financial stability.

The Basel Committee on Banking Supervision and the Financial Stability Board, amongst others, are strongly committed to exploring the principles and regulatory instruments needed to best serve an orderly and effective resolution of insolvent cross-border financial groups.

The European Commission recently launched an extremely important initiative for an EU framework for crisis resolution in the banking sector. This framework emphasises the need, in the European regulatory landscape, for careful consideration of the complexities which derive from the insolvency of trans-national groups.

Banca d'Italia actively participates in all of these projects. It places great attention on issues relating to banking groups, given the important role they play in Italy's economic structure and in its financial system.

Italy's banking legislation contains specific and well-established rules for dealing with banking group crises, and so far they have proved effective in the management of significant domestic cases. The challenge we are now facing is to extend our regulatory experience to develop effective global resolution measures for cross-border banking groups.

Useful insight may be gleaned from the valuable work which has been carried out by UNCITRAL in developing non-binding recommendations on cross-border insolvencies. Filling the gaps in the EC Regulation on group insolvency would also help regulatory efforts to coordinate the management of banking failure within Europe.

The goals of bank insolvency procedures differ from those of corporate insolvencies in that they serve broader public interests such as the safety and soundness of the financial system, the integrity of the payment systems and the protection of depositors' rights.

The specific nature of the goals would require the setting up of special insolvency regimes for banks, with a prominent role in crisis management entrusted to the supervisory authorities. These authorities should be equipped with effective early intervention powers in order to preserve the continuity of key financial functions and prevent systemic consequences.

Failures in banking and corporate groups do share a number of fundamental critical issues which should be addressed through a common regulatory approach.

These issues include managing:

- the complexities arising from the global distribution of assets;
- the difficulty of ensuring equitable outcomes for stakeholders in different jurisdictions;
- the obstacles to maximizing the value of a group.

All these issues, which involve the principles of general bankruptcy and corporate law, in addition to the delicate issues of conflict of jurisdiction, are as critical for banking groups as they are for non-banking groups. Moreover, at the present stage of market evolution, big non-bank firms are taking on more bank-like characteristics such as liquidity and market-sensitive trading activities, credit extensions and active risk management. It seems clear therefore that certain bank specific solutions could be appropriate for non-banking groups as well.

All these issues will be discussed in this seminar. We look forward to a constructive debate on a number of extremely interesting and expert contributions.

This is a challenging time. A time which is forcing us to rethink concepts that used to be certain, to employ innovative approaches to reshape the global regulatory framework; “to think the unthinkable”, as the saying goes.

I find the title of today’s seminar particularly well chosen. It should be read as an invitation to us all to strive for ambitious goals, no matter how far they may seem today.

Let us try then to answer the question: How can we achieve a new European Insolvency Law? What is the way forward?

Unfortunately I cannot remain today as I have a very full agenda. Giving the floor to Marino I wish you, as we say in Italy “buon lavoro”.

**Cross-border insolvency of multinational groups of companies:
proposals for an European approach in the light
of the Uncitral approach**

(Alberto Mazzoni)

1. Cross-border insolvency of multinational groups of companies: an ignored child becomes of age. – 2. The UNCITRAL approach. – 3. The issue from an European standpoint: a proposed tripartite approach. – 4. The proposed approach for ordinary cases. – 5. The proposed approach for special cases (banks, insurance companies, financial institutions and industrial companies of special Community relevance). – 6. The proposed approach for cases involving (also) non-EU subsidiaries. – 7. Final remarks.

1. Cross-border insolvency of multinational groups of companies: an ignored child becomes of age

Insolvency in the context of a multinational group of companies is a situation that is ignored as such by both the European Regulation 1346/2000 (hereinafter the “European Regulation”) and the UNCITRAL Model Law on Cross-Border Insolvency (hereinafter the “Model Law”), i.e. the uniform set of rules on insolvencies having an international dimension, that has been adopted by a number of important countries, among which the major common law countries (United States, Great Britain, Australia, New Zealand, South Africa), some Eastern European Countries (Poland, Romania, Serbia and Slovenia) as well as several other countries in different parts of the globe (Japan, North Korea, Colombia and others).

More specifically, it is true that both the European Regulation and the Model Law share the objective of governing situations of insolvency in an international context. However, they do so from a limited and almost unrealistic perspective. In fact, whilst the typical organizational format of a multinational enterprise operating in various jurisdictions is the group structure, i.e. an aggregation of a plurality of companies, each having separate legal personality and each possibly governed by a different national law, the European Regulation and the Model Law have chosen to confine their (official and direct) application to a much more infrequent (and practically much less important) situation, namely, the situation where the insolvent debtor (whether a physical person or a legal entity) is structurally a sole debtor, whose peculiar feature is to have assets and/or creditors in more than one national jurisdiction.

The underlying reason for this apparently unreasonable choice - namely, choosing to expressly regulate the marginal cases and abstaining from expressly regulating the ordinary and most important cases - is merely pragmatic.

Ten years ago, when almost at the same time the Model Law and the European Regulation came to the surface after years of laborious debates, the widespread feeling was that groups of companies and the problems of their insolvency in an international perspective were too complicated to be handled efficiently, not to say that they were thought to be totally intractable. In short, there was consensus around the idea that it would have been extremely difficult or virtually impossible to reconcile, on the one hand, the need for an overall or coordinated approach to the crisis of an international group as a whole and, on the other hand, the pressure at the level of national laws and national jurisdictions to enforce a separate national treatment for each company of the group.

Thus, rather than risking failure by pushing for a too ambitious project, prudence suggested to confine the scope of both international texts to the relatively simpler issues of the sole debtor having links in more than one jurisdiction.

Ten years after, however, the scenario and the mood have changed.

Both the Model Law and the European Regulation have been put to work and have permitted the accumulation of precious, practical experiences in dealing with international insolvencies.

In parallel, notwithstanding the initial fears of nationalistic hostility towards international cooperation in insolvency matters, such cooperation has actually taken place and has delivered, broadly speaking, encouraging results.

In addition, certain big insolvency cases involving multinational enterprises organized as groups of companies have made clear the necessity or, at least, the potentially great utility of having some sort of ad hoc rules, dealing at the international level with the issues of insolvency in a group context.

Finally, from an European perspective in particular, the rigid application of the principle of recognition, which is a characterizing feature of the European Regulation in sharp contrast with the underlying flexible philosophy of the Model Law, has forced the proliferation of certain peculiar legal problems in the application of the Regulation to cases involving companies belonging to a group with ramifications in more than one Member State: uncertainties and temptations of forum shopping have ensued, thus enhancing the case for new European rules on cross-border insolvency of groups (see *infra*, para. 17).

As a result, there has been, on the whole, a substantial weakening or decrease of the reasons for continuing to abstain from making rules in respect of the insolvency of international groups and a parallel increase of the strength of the reasons militating in favour of starting up the process of making such rules. Needless to say, the global financial crisis has added a powerful momentum to the initiatives aiming at a quick implementation of this process.

Unlike the European Union, UNCITRAL has already quickly moved in the right direction.

During the annual plenary session that will take place in New York from June 21 through July 9, 2010, the Commission will examine and presumably approve (with little or no changes) the three-year work done by its Working Group V (handling projects on insolvency) and consisting of the proposed addition of a Part III to the existing UNCITRAL Legislative Guide, as issued in 2004. Such Part III will be exclusively devoted to proposing or recommending new rules addressing the issues arising from the insolvency of groups of companies (or enterprise groups, as they are called in the UNCITRAL text, consistently with the ad hoc glossary laid down at its the beginning of it).

The choice of the format, i.e. the decision to adopt a supplement to the Legislative Guide as opposed to elaborating a draft Convention or an amendment to the Model Law or new separate Model Rules, reflects typical virtues and typical limitations of UNCITRAL's working method.

A draft Convention or new draft model rules would have had the advantage of the clarity inherent in the “dry” prescriptive language, which is typical of statutory provisions. However, most national legislators would at this time have flatly rejected the idea of accepting the binding character of a Convention in this field. Furthermore, a large number of legislators might also be reluctant to consider changing their own domestic laws by simply importing into them the specific wording of proposed amendments to the existing Model Law or the specific wording of new and separate model rules for the insolvency of groups.

Thus, UNCITRAL has prudently preferred to resort to the less committing technique of proposing innovative guidelines through a broadening of the existing Legislative Guide, so as to achieve the double result of getting across in any event its message and at the same time minimizing the chances of its work being flatly rejected on its face or received with sharp criticism or hostility. Inevitably, however, this entails the conscious acceptance of the risk of encouraging a wider margin of ultimate non-uniformity among the various national systems that will eventually accept to be inspired by the new Part III of the Legislative Guide in reforming their insolvency laws.

In practical terms, adopting the format of a supplement to the Legislative Guide results in the new UNCITRAL work being presented, first, via an introductory analysis of the relevant issues and the potential approaches for tackling them; hereafter, the specific proposals and/or recommendations, as elaborated on the basis of the internal debates in UNCITRAL, are laid down, with a view to providing guidance to national legislators in reforming and modernizing their insolvency laws.

My purpose in presenting this introductory report is not to analyse in detail the specific contents of the new UNCITRAL text (that I shall hereinafter call the “UNCITRAL Addendum”).

My purpose is rather to identify which lessons or suggestions may be extracted from the UNCITRAL Addendum in an European perspective, i.e. either for the purpose of clarifying or improving the application of the European Regulation or for the purpose of suggesting amendments or alternative solutions, specifically dealing with the problems of insolvency at group level.

To this specific end a quick glance at the structure and the underlying philosophy of the UNCITRAL Addendum will suffice.

2. The UNCITRAL approach

The UNCITRAL Addendum is composed of three Sections.

Section I endeavours to define the general and structural features of groups, whether entirely domestic or multinational.

Section II deals with certain selected issues, which are considered deserving of special attention and regulation in cases of insolvency affecting domestic groups.

Section III deals instead with a number of different issues, that are considered to be typically arising and to require regulation in situations of cross-border insolvency affecting multinational groups.

The proposals and recommendations set out in Section II are, generally speaking, inspired by two main ideas, namely (i) respect of the separate entity approach, i.e. respect of the principle according to which each corporate member of the group is a separate legal entity with its own estate and its own stakeholders; (ii) recognition, however, of the appropriateness and desirability of procedural coordination between or among parallel proceedings, each relating to a separate group member; accordingly, proposals and recommendations are offered in respect of, inter alia, joint application for simultaneous commencement of parallel proceedings; subsequent joinder of pending proceedings; appointment of the same insolvency representative for a plurality of parallel proceedings; cross-exchange of communications and information and holding of joint hearings; last but certainly not least, possibility of proposing coordinated reorganization plans.

The separate entity approach is proposed to be disregarded only in cases warranting substantive consolidation (pooling of assets). Essentially, substantive consolidation is presented as justifiable in extreme cases only and, although the UNCITRAL Addendum offers a quite detailed list of factors that may be considered as relevant for the purpose of determining in which cases substantive consolidation should be ordered, it appears that basically the constantly decisive factors are two, namely commingling of assets and some form of fraud (whether actual or constructive, depending on the facts of each case and the legal tradition of each national legal system).

In general terms, the consideration to be kept in mind is that the comparative law panorama retained by the UNCITRAL Addendum does not lend support to the single enterprise approach in dealing with the issues of insolvency involving groups: the predominant approach and rule remains the separation of the legal entities and their respective assets, whilst treating the group as an entity and as the holder of an unified estate, resulting from the pooling of the assets of all the members of the group, remains the exception.

Section III of the Addendum deals with the international issues and does so by making proposals and recommendations that focus on aspects that at first sight are significantly different from those covered by Section II. In particular, whilst the emphasis in Section II falls on the importance of joint or coordinated commencement (or subsequent procedural coordination) of parallel proceedings within the boundaries of the same national jurisdiction, Section III rather focuses on access to foreign courts, recognition of foreign proceedings and promotion of loosely defined forms of cooperation among courts of different States and among insolvency representatives of different national proceedings.

The distance between Section II and Section III is, however, more perception than reality.

On a closer look, it appears that Section II recommends as proper and feasible within a domestic context a number of initiatives, instruments and remedies that are envisaged as reasonable and appropriate per se in the context of the insolvency of any group, i.e. whether the context is entirely domestic or multinational.

Thus, beneath the surface there appears the real aim (or one of the real aims) of Section II of the UNCITRAL Addendum: the domestic scenario is largely used as a sort of less controversial laboratory for testing innovative and more advanced solutions, with the underlying intent or hope that, once the quality test of such solutions shall have been run with satisfactory results in a purely domestic perspective, there will be less resistance against exporting the same or similar solutions into a broader, international scenario.

Bearing that in mind, it is not surprising to find that Section III envisages, as practical examples of measures of transnational cooperation among courts and/or insolvency representatives of different States, the “voluntary” adoption (to the maximum extent permitted under the applicable local law) of certain techniques of procedural coordination, as are expressly recommended for enactment in the field of the insolvency regulation of entirely domestic groups.

Moving from the fundamental choice in favour of the separate entity approach (and from the parallel and consequential rejection of the single enterprise approach), the rule of the game in Section III of the UNCITRAL Addendum may be defined by the combination of three factors: (i) the coordination of proceedings pending in different States and cooperation among courts and insolvency representatives administering such proceedings; (ii) the voluntary (in the sense of non-mandatory) nature of such coordination and cooperation; (iii) the introduction of enabling rules removing legal prohibitions of and/or factual obstacles to the voluntary adoption of measures promoting or implementing such coordination and cooperation.

Bearing in mind the nature and functions of UNCITRAL, the approach defined by the combination of these three factors provides a model, which is perfectly appropriate for tackling group insolvency issues from the truly international perspective (in the classic sense) that must be adopted by UNCITRAL.

The strongest argument in favour of an highly integrated insolvency administration of an entire multinational group - namely, efficiency and preservation in the best interests of all parties concerned of the values or plusvalues that would be lost or destroyed in a fragmentation of isolated proceedings - is not strong enough to induce each State, taken individually, to unilaterally restrain or waive ex ante, by virtue of self-limiting provisions of its own jurisdiction, its power to administer assets and rights that are contained in (or connected with) a

separate legal entity with respect to which general or bankruptcy jurisdiction of such State may be exercised.

More generally, it is hardly imaginable that a State may unilaterally decide to determine the scope of its own jurisdiction (whether bankruptcy jurisdiction or jurisdiction of a general nature) by taking into account and deferring to the needs of efficient administration of the insolvency of a multinational group.

These are results that could only be obtained via a multilateral Convention of quasi universal acceptance; but a Convention of this sort is still a far-fetched dream by reference to straightforward, simple bankruptcies involving one debtor only; and would not only be a far-fetched but a truly impossible dream if its aim, as of today, were to cover the field of the insolvency regulation involving all the members of a large multinational group.

Thus, in the absence of a special legal and constitutional frame such as the one by which the European Member States are bound, the best available approach for achieving as much as possible efficiency and preservation of values in the case of insolvency of a multinational group is to do precisely what the UNCITRAL Addendum recommends, namely refrain from suggesting the introduction of mandatory rules of either substantive or procedural nature and promote instead the express adoption of merely enabling rules favouring the principle of international comity. In substance, the idea is to permit, whenever possible and with agility of forms, a case-by-case convergence of choices (or the preference, on grounds of comity, for a solution based on a “better” foreign rule) via the coordinated exercise of different national jurisdictions, none of which may claim to prevail on the others, whether in characterizing the issues before it or in determining by which procedural or substantive rules each issue must be solved.

3. The issue from an European standpoint: a proposed tripartite approach

The European Union, however, is neither a Federal State with a uniform substantive regulation of insolvency nor a mere plurality of geographically close States, each of which is entirely free to regulate as it wishes any situation of insolvency characterized by an appreciable degree of “internationality”.

Thus, for our purposes, the main question to be tackled is which sort of approach, consistent with its constitutional structure and political objectives, should be adopted by Europe in regulating cases of insolvency involving a multinational (but intra-European) group.

More specifically should Europe

- (i) take the UNCITRAL Addendum approach, i.e. promoting by merely enabling measures the coordination and cooperation on equal footing among parallel proceedings in different Member States?; or
- (ii) take the European Regulation approach; i.e. adapting to the group Tatbestand the notion that it is necessary or advisable to identify a main proceeding

in one Member State for the regulation of the insolvency at group level, subject to the possibility of limited territorial proceedings being opened in other Member States so as to ensure special protection to certain pre-defined rights or interests?; or

- (iii) take a hybrid approach, i.e. adopting the UNCITRAL approach as the minimum common denominator for coordination and cooperation among Member States but permitting also on a voluntary basis the switch from the UNCITRAL approach to the European Regulation approach (or, more precisely, to a variant of the European Regulation approach)?

My core submissions in this report may be summarized as follows:

- (i) the approach for ordinary multinational (but intra-EU) cases must be the hybrid approach, referred to under (iii) in the preceding paragraph;
- (ii) for multinational groups operating in strategic fields and whose parent company is subject to special prudential regulation on a consolidated basis in a Member State (such as banks, insurance companies and financial institutions) and for groups, whose insolvency (or other relevant state of financial crisis, to be defined by a uniform European law rule) must be deemed to have community relevance pursuant to predefined European law standards, the European Regulation approach, or an appropriate variant of it, must apply so as to ensure, on the one hand, the “supremacy” of one main proceeding opened in one State in accordance with a uniform European law criterion and, on the other hand, the balanced protection, if need be, of legitimate local rights and interests via non-main territorial proceedings;
- (iii) whenever insolvency proceedings are opened in one or more Member States in respect of one or more companies belonging to a multinational group and these proceedings do not encompass the administration of further companies of the group located outside the EU, Member States should address the issue of dealing with the insolvency of such non EU-companies of the group by adopting similar or converging standards (as opposed to letting the present situation to continue, i.e. each Member State applying to extra-EU insolvencies its “common law” treatment of international bankruptcy: in Italy, art. 9 of the Bankruptcy Law). In this perspective the UNCITRAL Model Law and/or the principles set forth in Section III of the UNCITRAL Addendum should be, in my opinion, the most natural candidates for providing to the benefit of all EU Member States uniform standards of voluntary cooperation and coordination in dealing with these extra-EU ramifications of the insolvency at group level.

A proper illustration of each of the above submissions would require a level of analysis and an amount of time, that would substantially exceed the limitations that I must observe.

I shall therefore confine myself to offering a more limited set of remarks that will hopefully be sufficient to illustrate the rational basis on which my submissions are founded.

4. The proposed approach for ordinary cases

The rationale for advocating the hybrid approach as the advisable solution for “ordinary” cases (within the meaning that I have clarified above) is the desirability of two different tracks: one for those cases that can be dealt with through separate and parallel national proceedings aiming at the individual liquidation or restructuring of each of the companies belonging the group; the other for those cases that need the granting of a clear and safe authority for carrying out a cross-border reorganization at group level, via a strong coordination of different national proceedings under the leadership of the court of a Member State in charge of supervising and finally confirming or rejecting a joint reorganization plan.

The first track, generally speaking, would provide a rational solution whenever the history and structure of the group or other special factors or circumstances make it unrealistic to re-organize at a multi-national (or, more accurately, at a multi-jurisdictional) level. In this scenario each company of the group (or any non-core company of the group) may well be liquidated and/or reorganized as a separate economic unit as well as a separate legal entity, and cooperation and coordination along the lines suggested by the UNCITRAL Addendum model is a perfectly reasonable solution.

Within the intra-European legal order, however, there must also be in certain cases the possibility of going beyond that approach. Specifically, this must be possible whenever efficiency and preservation of values would be best achieved through a strongly coordinated cross-border reorganization, based on a plan filed before an appropriate national court and subject to the supervision and final confirmation by such court in accordance with its own national insolvency law.

The major obstacle to be surmounted in order to achieve this goal stems from the conceptual, practical and political impossibility of conceiving an extraterritorial reorganizational jurisdiction of the court of one Member State on all the entities and assets of the group, based on the mere fact, treated as “jurisdictional title”, of the existence of sufficient group ties: essentially, based on a finding that, prior to the insolvency or crisis of the group as a whole, there was a unified group direction, stemming from the existence and actual exercise of an adequately effective control power.

At the present stage of evolution of the generality of the European legal systems, the only conceivable route to surmount the aforesaid obstacle is to strengthen and to expand, within the national insolvency law of each Member State, the role of two forceful legal concepts and values, namely “private autonomy” and “majority rule”.

The traditional insolvency laws of the ninetieth and twentieth century did typically focused on two main features, namely (i) the official and authoritative character of all insolvency proceedings, leaving little or no room for contractual adjustments among the owner or owners, the financial and commercial creditors and/or the other stakeholders; and (ii) the nature of vested individual right of each filed and admitted claim. The trend of contemporary insolvency laws, however goes in quite different or sharply modified directions.

Firstly, private autonomy is permitted to carve out for itself an expanding role even within the applicable insolvency law and the proceedings governed by it (including also to some extent the power to concur in the choice or designation of a potentially alternative proper law).

Secondly, private autonomy is no longer viewed as the kingdom of vested individual rights of each claimant, but rather as a principle warranting the administration via the majority rule of the presumable common interests of the members of the same class of claimants.

In the European context the combination of these factors (private autonomy and majority rule) within the framework of institutional ties by which the Member States are bound result in the realistic possibility of offering and justifying a hybrid approach for dealing with those situations where a cross-border intra-European multicompany reorganization is sought.

There is obviously a fundamental necessity to clarify the respective roles of the laws that may come into play in such a reorganization scenario. In particular, a rational basis must be provided for distinguishing the role to be attributed to EU law and, respectively, to the various national laws that must have a say on the matter, based on their own criteria of asserting jurisdiction on the company law issues and the insolvency law issues that are necessarily involved in a joint reorganization attempt.

On the assumption that the basic jurisdictional and conflict-of-laws choices underlying the European Regulation are going to be maintained even in addressing the insolvency situations at group level, it would seem that EU law should confine itself to defining the “jurisdictional title”, i.e. the relevant factual basis, justifying the fixing of the (main) reorganizational jurisdiction in a Member State only; consistently therewith, the national law of the State that can legitimately exercise such jurisdiction shall be the law governing the filing, supervision and final judicial confirmation of the plan, as well as the contents and the effects of the rights and obligations deriving therefrom, including the inter-companies fairness of the final distribution by reference to the respective weight of the contribution to the reorganized structure (often, presumably, a Newco), that is attributable to the reorganization worth of each participating entity.

By contrast, the national law applicable to each of the proceedings that would be ultimately closed by “merger” into the approved plan (if finally confirmed) would govern all the other (and, conceptually, preceding) issues. In particular, it would govern the conditions for opening (or not opening) an insolvency proceeding in each given State (or for carrying out a non-insolvency proceeding based on company law principles in cases of participation of a solvent company in the group restructuring); the procedure for filing and admitting or rejecting claims; the procedure for organizing class votes, judging on conflicts of interests and expressing consents or rejections in respect of proposals relating to the participation in the plan, as well as all internal issues of fairness and priorities as may arise among the various claimants within the same national proceeding.

In substance, the issues of both individual and collective entitlement to participate in the plan on a voluntary basis should be governed, with respect to each participating entity, by the law of the national proceeding applicable to such entity, whilst the law of the State having reorganizational jurisdiction by uniform EU standards should govern, procedurally, the step by step evolution of the plan and, substantively, the contents and effects thereof, including in particular the overall inter-companies fairness of the final distribution of paper and/or cash among the original claimants in each of the national proceedings.

5. The proposed approach for special cases (banks, insurance companies, financial institutions and industrial companies of special Community relevance

With respect to the cases to be treated as special either “by nature of the business” (banks, insurances and financial institution) or on grounds of “special Community relevance” (I am thinking, for instance, of potential insolvencies of automobile groups or airlines groups), the underlying and guiding idea should be that the logic of regulation and/or of the governmental supervision over that sort of insolvencies must drive the administration of the insolvency, not the reverse.

Fundamentally, this idea is already reflected in the existing Directives concerning insurances, banks and credit institutions (Directive 17 and 24 of 2001) but these Directives, on various grounds, are incomplete or insufficient for the purpose of expressly and adequately dealing with group situations (moreover, Directive 17 on insurances will cease to be effective on November 1, 2012 and will be replaced by Directive 138 of 2009).

Thus, the regulation at group level of insolvencies involving systemic risks or having special Community relevance is still a wide open issue and deserves here a few comparative comments.

Consistently with the idea that in special cases it is appropriate to establish the leadership of a specific authority and the supremacy of a specific proceeding over the entire process, I hereby submit that the approach for these special cases should basically reproduce in enhanced format the approach that has been hitherto applied in the single debtor cases.

Accordingly, the insolvency of these groups should be governed on the basis of a model providing for mandatory provisions of European law establishing the jurisdictional criteria for opening the main insolvency proceeding in a Member State and determining the powers of leadership and coordination to be granted to the (preferably administrative) authority, that (subject to adequate forms of judicial review) shall be put in charge of such main proceeding, so as to ensure proper direction and coordination with any other collateral non-main proceeding, which may be opened in any other Member State.

It should be noted, however, that the national law of the State, where a non-main proceeding would ex hypothesi be opened, should be given, in this context,

a much narrower scope of application than in the case of a non-main proceeding opened for liquidation purposes pursuant to the existing European Regulation. While in the existing European Regulation the opening of a non-main proceeding is a permitted legal remedy, pursuant to which the needs and aims of territorial protection of local interests and values are by definition allowed to prevail over the “limited universality approach” implemented through the extraterritorial application of the law of the main proceeding, the same principle or approach cannot apply to these special cases involving systemic risks or having extraordinary relevance at both national and Community level.

In my opinion, the inescapable alternative is between (i) letting the *lex concursus* of the main proceeding apply to a very large extent even within all the “subordinate” non-main proceedings; or (ii) providing for specially subservient rules of the national law governing any non-main proceeding; and by specially subservient rules I mean in this context provisions to be construed and applied so as to avoid the possibility of conflict or inconsistency with the reorganization or liquidation or recapitalization directives issued by the leading authority in charge of the main proceeding.

In the case of strictly regulated businesses such as banks and financial institutions, potential conflicts of sovereignties should be solved through concerted action at the level of the top regulatory authorities of the involved Member States.

In the case of less regulated (but still strategically or socially very relevant) businesses, such as the above mentioned automotive businesses or airlines businesses, it is conceivable that the cross-border powers of supervision and coordination to be granted to the authority in charge of the main proceeding may be subject to limitations or restrictions vis-à-vis any non-insolvent subsidiary of the group situated in a Member State other than the one where the main proceeding was opened. It must be frankly conceded that while a substantially extra-territorial application of the *lex concursus* governing the main proceeding is conceivable in respect of other insolvent members of the group, it is hard to imagine the non-insolvency jurisdictional grounds on which there could be extraterritorial “involuntary” application of the main proceeding and its *lex* to a foreign solvent company.

A further and final suggestion that I dare to advance with respect to these specially relevant cases involving regulated businesses or businesses with Community relevance is the enactment of a mandatory rule of EU law, prescribing the necessary participation of the European Commission in the main proceeding as *amicus curiae*.

The rationale is, I believe, obvious: competition rules, State aids and preservation of the objectives of the single market policy are all factors that are directly or indirectly involved in the administration and final outcome of group insolvencies of this sort.

Neither the logic of the ordinary judicial treatment of insolvencies nor the potentially anti-competitive approach of regulatory or political institutions inspired by their respective goals and culture (stability and, respectively, social consensus)

are capable per se of warranting that the exits from these situations will be consistent with the overall aims and principles on which the European Union is founded.

The presence of the Commission as *amicus curiae* and as protector of both free market conditions and social cohesion would be, in my opinion, a correct institutional recognition of the necessity of striking a fair balance among the crucial needs and values that are at stake in these proceedings.

6. The proposed approach for cases involving (also) non-EU subsidiaries

With respect to the issue of the “international” treatment to be applied to non-EU member companies of an EU-based group struggling with insolvency, I will only mention two reasons in support of the proposed adoption by all Member States of uniform criteria of cooperation and coordination based on the UNCITRAL Model Law and/or the UNCITRAL Addendum.

The first reason is that there would be clear advantages in favouring the application, as a minimum common standard, of the same liberal rules or cooperation and coordination among all courts or insolvency representatives involved in the administration of insolvency proceedings affecting member companies of the same group, irrespective of whether any given company is EU or non-EU based. In particular, this might be beneficial for the purpose of favoring the stipulation of cross-border concordats.

The second reason is political in the best sense.

Adopting the UNCITRAL Model law or the UNCITRAL Addendum approach for handling in a uniform manner all the relationships with non EU-members of the same group would be a cost-free, tangible sign of the capacity of the European Member States to take at last a common position and to react in a constructive, coordinated way within UNCITRAL, i.e. within a specialized agency of the United Nations where much too often Europe plays a much lesser role than the one it could and should play, owing to the frequent absence of agreement on a common stance.

Furthermore, in the case of a country, such as Italy, that has a peculiarly old-fashioned, ambiguous and unilateral bad rule for dealing with international (non-EU) bankruptcies (I am obviously referring to Art. 9 of our Bankruptcy Law), this would be a good opportunity – not to be missed once again, as it was unfortunately done in the recent bankruptcy reform of 2006 and 2007 – to upgrade our law, by bringing it up to a civilized standard on this point.

7. Final remarks

My final remarks will touch upon a well known aggressive use (not to say abuse) that has been made of the European Regulation with a view to achieving in practical terms the goal of coordinating under the supervision of the same court a number of parallel insolvency proceedings affecting different companies of the same group.

Under the European Regulation, as interpreted by the Court of Justice in the well known Eurofood case, all courts of any other Member State are bound to recognize as main proceeding an insolvency proceeding that has first been opened as such in a given Member State with respect to a company, irrespective of whether such company is a separate legal entity on a “stand alone” basis or within the meaning that the notion of “separate legal personality” has in a group context.

Whilst the practical result in the Eurofood case has been that, notwithstanding the purely financial nature of the subsidiary involved, the prior opening of an insolvency proceeding in the Member State where such subsidiary was registered was held to be sufficient to frustrate the attempt of the extraordinary commissioner of the parent company (Parmalat) to attract administration of the subsidiary’s assets under the jurisdiction of the Italian court supervising the main proceeding of the parent company, the outcome most likely triggered by the principle of recognition is not the one that the holding in Eurofood would seem at first sight to encourage and to support.

In other words, rather than favouring in each Member State the opening as main proceeding of an insolvency proceeding for each separate entity of the group, the Regulation has triggered the opposite reaction, that is the practice of running to the court of the State of registered seat of the parent company so as to deploy there the (often successful) attempt to induce such court to make a finding that the centre of main interests of all, or substantially all, companies of the group is in that State, i.e. in the State of COMI of the parent company.

As a result, a rule at first sight proclaiming the impossibility of avoiding a plurality of main proceedings in different Member States (one for each subsidiary) has been practically converted into a rule, making it possible to open in the same State a plurality of parallel main proceedings affecting foreign subsidiaries, i.e. companies incorporated in other Member States, on the sole basis of the COMI of each such subsidiary having been found to be “localized” in the State of the parent company.

Having so described the terms of this “unexpected” use of the European Regulation, a legal assessment of it in a *de jure condendo* perspective is, I believe, in order.

From the standpoint of the principles which are the pillars of the European Regulation in its present format, it is clear that the principle of recognition may be abused.

However, consistent with the philosophy underlying the principle, the remedy against the abuse is, necessarily, to raise the jurisdictional issue before the courts of the State where an insolvency proceeding has been opened as a main proceeding, *ex hypothesi* in breach of the European law notion of COMI.

Conversely, no attack against the alleged abuse may be entertained by the courts of any other Member State, owing to the rigidity (that should be maintained, in my opinion) of the principle of recognition.

As a practical alternative to a jurisdictional attack before the courts of the State where the COMI has first been found to be localized, there is always the possibility of requesting the opening of a non-main proceeding in the State of registration of the subsidiary, where the allegedly “real” COMI should have been found to be localized in accordance with the presumption laid down by Art. 3.1 of the European Regulation.

There may be, however, a disadvantage in doing that: since a non-main proceeding can only concern assets located within the State where such proceeding is opened and the purpose of such proceeding can only be the liquidation of the territorial assets (Art. 3.3 of the European Regulation), the initiative for the opening of a non-main proceeding may well be of interest only for those creditors that are in favour of a quick, piecemeal liquidation of the local assets. If, as it typically happens for banks, big suppliers and local workers, liquidation is not desirable and reorganization under a “foreign” main proceeding is a more attractive prospect even if, *ex hypothesi*, built upon a doubtful jurisdictional ground, the practical result may well be that the “legally wrong” opening of a plurality of main proceedings in the State of the parent company is ultimately left undisturbed, with a view to practically giving reorganization a real chance.

In my opinion, however, it is self-evident that the present uncertainty as to the meaning and prescriptive content of the notion of COMI cannot indefinitely continue.

The brilliant academic attempt made by BENEDETTELLI to give the notion an open interpretation that would vary depending on the aims of the specific national proceeding sought to be opened in a given Member State has not been accepted; and rightly so, in my opinion, despite the high intellectual quality of the proposal.

COMI, whether in the sole debtor scenario or in the group scenario, must be a uniform notion of EU law requiring autonomous application.

The problem is, therefore, which rule or approach should be introduced, by statute or case law, in order to provide more specific guidance with a view to ensuring uniformity of application and predictability.

Of the three conceivable methods that may be resorted to (a rule setting out a conceptual definition calling for a syllogistic application; reliance upon the long-term development of case law; adoption of a typological, based on a rule providing the listing of a large number of relevant factors and a final judgment based on the presence of at least a majority of such factors), I would definitely prefer the choice of the third solution, namely the typological approach.

I know, however, that this is far from being an absolutely cogent conclusion and I believe that the debate on this point is bound to continue, presumably until clarification on COMI will be achieved in the future revision of the existing European Regulation or in a new Regulation concerning cross-border insolvency of EU-based multinational groups.

Ways towards a Group Insolvency Law

Christoph G. Paulus

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1. Where we come from

It is a matter of fact that there is no *via regia* to the ideal group insolvency law. It is for this reason that it is preferable to describe more than one way – at least when and if all what is intended is to present developments rather than an intellectual concept. As it happens to be: Ways do come from somewhere and they lead somewhere. Even though this paper concentrates primarily on a particular segment of these ways – namely the respective efforts undertaken by UNCITRAL and Germany at the present time – it seems to be helpful not to neglect entirely the from and to somewhere.

Regarding the from somewhere the starting points of those ways are somewhat vague. Various jurisdictions such as Argentina (1) or the US had already for quite some time more or less used trails which were sufficiently safe for walking on them. Most jurisdictions, however, had been aware of the phenomenon that group related enterprises tended to go bust successively but nevertheless collectively – and that this created considerable practical challenges (2). This awareness resulted usually in the diagnosis that it would be advisable to give some thoughts to it (3). But, until such thoughts would bear fruits one should proceed on the time-honored way which ignores any group related issues and sticks to the traditional liquidation scheme (4). This attitude finds its well-known expression in the equation: “one company, one insolvency, one proceeding” (5).

And that was the way on which Germany, for instance, walked as well as UNCITRAL in its Legislative Guide at the time of its adoption by the General Assembly in 2004 (6).

As is well known, this lethargy came to a sudden stop with the European Insolvency Regulation which entered into force on May 31, 2002. The English practitioners brought the interpretative flexibility of art. 3 par. 1 EIR home to the astonished continental insolvency community by using the concept of “centre of main interests” as an invitation for a modern and effective group insolvency

(1) Cf. Miguens, *El Grupo Insolvente*, 2009; idem, *Extensión de la Quiebra y la Responsabilidad en los Grupos de Sociedades*, 2nd ed., 2006; idem, *Liability of a Parent Corporation for the Obligations of an Insolvent Subsidiary under American Case Law and Argentine Law*, *Am. Bankruptcy Inst. L.R.* 10, 2002, 217, with references primarily to US literature.

(2) Cf. *Erster Bericht der Kommission für Insolvenzrecht*, 1985, p. 290 ff.; Kübler, *Konzern und Insolvenz*, *ZGR* 1984, 561 ff.; Lutter, *Der Konzern in der Insolvenz*, *Zeitschrift für Betriebswirtschaft (ZfB)* 1984, 781, 784 ff.; K.Schmidt, *Die konzernrechtliche Verlustübernahmepflicht als gesetzliches Dauerschuldverhältnis*, *ZGR* 1983, 513.

(3) Regarding practical difficulties in coping with group insolvencies cf. Taylor, *Practical Difficulties in Handling Group Insolvencies*, in: Peter / Jeandin / Kilborn, *The Challenges of Insolvency Law Reform in the 21st Century*, 2006, 247; additionally Görg, *Grundzüge der finanziellen Restrukturierung der Philipp Holzmann AG im Winter 1999/2000*, *Festschrift (FS) Uhlenbruck*, 2000, 17.

(4) In contrast thereto Freudenberg, *Der Fortbestand des Beherrschungsvertrages in der Insolvenz der Obergesellschaft*, *ZIP* 2009, 2037, 2038 f.

(5) See just Haas, in: Gottwald (Hg.), *Insolvenzrechts-Handbuch*, 3. Aufl., § 95 Rz. 2 ff., p. 1514 f.; Depré / Büteröwe in: Beck / Depré, *Praxis der Insolvenz*, 2003, § 25 Rz. 109; K.Schmidt, *Gesellschaftsrecht* 4th ed., 2002, p. 957 f.

(6) But see there also p. 276 ff. (Two V 82 ff.), where some of the relevant problems were addressed.

law (7). Europe's first reaction was indignation and outrage (8) but soon thereafter this approach was copied by many jurisdictions including Italy, France, Germany, Hungary, etc. This European development was closely observed by many foreign jurisdictions and became, thus, one of the triggers for Working Group V of UNCITRAL to engage in this topic. At about the same time, the German Ministry of Justice, too, became interested in this field and started deliberations about how to amend the German insolvency law.

2. The ways

2.1. UNCITRAL

2.1.1 Technicalities

In its abovementioned Legislative Guide on Insolvency Law, the United Nations' Commission on International Trade Law submits recommendations to any interested legislator as to which issues need to be addressed in a modern and effective insolvency statute and which options are available. Each one of these recommendations are accompanied by rather detailed explanations. In this, the Guide differs from the Model Law on Cross-Border Insolvency from 1997 as the Guide refrains from presenting section-like formulations but stops at displaying the various legislative options.

2.1.2 Details (9)

To be sure, the subsequent description is not meant to be all-encompassing. This means that the final elaborations are much more multifaceted than they appear in this text. Needless to point out that for this very reason a closer inspection of the working papers (and soon: the amended Legislative Guide (10)) is well deserved. A more comprehensive and substantiated description of the relevant issues and their comparative appearance (e.g. regarding automatic stay, or subordination of particular categories of claims, or extension of liabilities on third parties, etc.) is hard to find.

2.1.2.1 Specification of the subject

In the beginning, scepticism as to the feasibility of the task to develop rules about group insolvency law was prevalent but diminished in the course of the discussions. In sight of the manifold meanings of the term 'group' it was agreed

(7) See just Paulus, Die EuInsVO – wo geht die Reise hin?, Neue Zeitschrift für Insolvenzrecht (NZI) 2008, 1 f.

(8) Representative for many Weller, Inländische Gläubigerinteressen bei internationalen Konzerninsolvenzen, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 169, 2005, 570, 581.

(9) See additionally Rodriguez, Die Empfehlungen der UNCITRAL zur Behandlung von Gruppeninsolvenzen unter Berücksichtigung der Sanierungsrechtsrevision in der Schweiz, ZZPint 2011 (forthcoming).

(10) See for the pre-release: www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html. In what follows in the text, references are made to the paragraphs of this pre-released text.

upon in the beginning to leave its determination open until the end; this was also meant as a precaution against jeopardizing the project right at the outset. However, an agreement (albeit a rather vague one) could be reached earlier. Accordingly, an Enterprise Group is the interrelationship between two or more enterprises which is based on (significant) ownership or control (11). For a closer understanding of this determination and because of its unique comparative quality, it is recommended to read the Guide's description of the reasons for why group formations are (or appear to be) attractive (12).

2.1.2.2 *No inclusion of solvent group members*

It became soon clear that solvent members of a group must not be included in any rules of a group insolvency law. The main reason being that otherwise manipulations would be activated which could lead straight to a conflict of goals between insolvency law and unfair competition law (13). Since an entire group could achieve unfair protection from its creditors through an automatic stay when and if only one enterprise of this group files a respective petition. Accordingly, the following deliberations refer exclusively to those group members which fulfill the respective domestic reasons for opening an insolvency proceeding.

2.1.2.3 *Application*

The possibility is granted for one or more creditors and more than one group member respectively to file a petition jointly ("joint application" (14)). The advantage thereof is that the court is relieved from the task to investigate into the group structure which can be more often than not quite burdensome. It is evident, however, that this rule serves its purpose best when combined with the determination of that court which is competent for dealing with all group members' cases. For that, two possibilities exist: either a determination which provides ex-ante-clarity (e.g. the court competent for the parent company's insolvency) or one which gears to the priority principle (either of the application or of the opening).

2.1.2.4 *Procedural consolidation*

The form how of and the degree to which two or more insolvency proceedings are to be procedurally coordinated in a given case shall be left to the determination of the judge (15). The range of possibilities is quite large: it reaches from the

(11) Cf. I par. 26 ff. Critical towards this definition because of its vagueness and boundlessness K.Schmidt, Konzern-Insolvenzrecht – Entwicklungsstand und Perspektiven, Zeitschrift für Insolvenzrecht – Konkurs, Treuhand, Sanierung (KTS) 2010, 1 (sub III 1).

(12) Cf. I par. 17 ff. Of additional interest Theisen, Der Konzern, 2. Aufl. 2000, S. 2 ff.; Windbichler, Corporate Governance internationaler Konzerne unter dem Einfluss kapitalmarktrechtlicher Anforderungen in: Hommelhoff / Hopt / v. Werder (ed.), Handbuch Corporate Governance, 2nd ed., 2009, 825, 826 f.; Lutter, Der unvollendete Konzern, FS K.Schmidt, 2009, 1065 f.

(13) Cf. already Paulus, Die Insolvenz als Sanierungschance – ein Plädoyer, ZGR 2005, 309, 320 f.

(14) Cf. II par. 5 ff.

(15) See recommendations 202 through 210.

mere joint notification over exchange of information, coordination of creditors' meetings or other hearings, appointment of a single creditors' committee (16), to the cooperation of the administrators or the appointment of a single person as administrator in two or more group related proceedings (for this, see also infra sub h). The court might be given this power not only on its own but might also decide so upon request of certain third parties; this could be one of the debtor companies, an administrator within the insolvent group, or a creditor when and if he is creditor of more than one group member. For the sake of flexibility and adjustment to the given circumstances, the court shall be free to modify or alter its determinations whenever this appears to be appropriate.

2.1.2.5 *Post-commencement financing*

At least with respect to an envisaged reorganization the need for a post-commencement financing is absolutely essential in an insolvency proceeding. It might be, for instance, inevitable for the continuation of the functioning of a group that the insolvent parent (or finance holding) company provides financial support to the solvent affiliate (possibly in another country) so that this factory can keep producing the valuable goods for which the group stands. Similarly, a solvent group member might see itself in the situation where it has to support its insolvent counterpart – as it is, generally speaking, more often than not rather randomly within a group which of its members is insolvent and which is not. Thus, when and if the value of the group as a whole shall be preserved a cross-financing of the described sort will be indispensable fairly often. To be sure, from an ex ante perspective such a situation is open: if the reorganization is successful the creditors will usually profit from the cross-financing but they won't in case of a failure.

In sight of this dilemma, a legislative positioning as to the (im)permissibility of such financing will be helpful even if they, as a matter of fact, cannot do away with the uncertainty. The recommendations (nos. 211 through 216) speak out on the option for insolvent companies to engage in such cross-financing (through pledging assets or other securitization) when and if the administrator deems this to be essential for the continuation and reorganizability of this debtor. In this context, the court shall have the power to approve such engagement on its own or by making it dependent on the consent of the creditors.

2.1.2.6 *Actio Pauliana*

Irrespective of their emphasis on predictability and calculability for third parties do recommendations 217 and 218 look rather vague. It is mentioned that affiliated companies might be qualified as related persons and it could be left to the court to decide whether this is the case or not – depending on the circumstances of the transaction in question. For lawyers from a codification system, this discretion is rather unfamiliar; but possibly such flexibility does an individual case more justice than the generality of codified rules. However, as a kind of compensation,

(16) Note that this option might lead to a loss of control, depending on the size of the group.

the legislator is advised to apply its traditional tools for increasing flexibility such as presumptions, distribution of the burden of proof, or other defense options which might appear to be appropriate in the context of a group insolvency.

2.1.2.7 *Substantive consolidation*

To the degree that an exception proves the rule shall a substantive consolidation, i.e. the merging of the plural estates into one single estate, be permitted only in very restricted circumstances – thereby underlining the absolute preponderance of the rule that the estates of each insolvent group member are to be seen and treated separately (cf. recommendations 219 through 232). Accordingly, a substantive consolidation shall be permitted only in two cases – namely when and if the court is convinced that (a) the assets and/or the liabilities are intermingled to a degree that their separation would consume so much time or means that the benefit for the estates cannot outweigh the loss for the creditors; or (b) the debtor companies have acted in a fraudulent manner and without a legitimate purpose whereby the judge shall be convinced that the substantive consolidation is inalienable for getting the fraudulent results back to straight.

In such scenarios, the judge shall act and decide only upon application. The application could be part of the filing of the opening petition. The effects of a respective judicial decision are the lapse of inter-group member-liabilities and -claims, the unification of the multiple debtors into one single debtor, and, accordingly, the possibility of a single creditors' assembly. However, pre-acquired privileges as well as certain securities, as a rule of thumb, are to survive this unification. It is of highest interest that the court shall be given the power to exempt certain assets or claims from these effects; as in general, the court shall have the right to modify at any time its order to consolidate the estates (without retroactive effect, though).

2.1.2.8 *Appointment of an administrator*

In the context of procedural consolidation is foreseen, as a matter of fact, the possibility to appoint one and the same person as administrator in multiple or all group related proceedings (recommendations 233 through 237). The court shall decide so when and if this is in the best interest of the administration. To the degree that situations might arise in which this administrator is in a conflict of interest, the law shall provide for redress, primarily by allowing the appointment of a special examiner. If the judge abstains from appointing just one administrator, recommendations 235 and 237 suggest that the statute foresees for such a case the cooperation between the multiple administrators to the utmost extent possible (17). Examples for such cooperations are offering an exchange of information or a

(17) A comparable rule exists in Principles 23 and 24 of the American Law Institute's Transnational Insolvency Project; for this cf. Westbrook / Booth / Paulus / Rajak, A Global View of Business Insolvency Systems, World Bank 2010, p. 259 ff., 261.

hierarchisation of the proceedings, but also the conclusion of an agreement which is also known as “protocols” (18).

2.1.2.9 *Reorganization*

Recommendations 238 and 239 address the option of setting up an insolvency plan for more than one insolvent group member (which possibly could also include further, solvent members). However, in order to cope thereby with the multiplicity of interests, more often than not even conflicting ones, such plan is at best a master plan which needs specification in individual plans for each insolvent group member.

2.1.2.10 *Transnational cases*

In insolvency cases crossing borders of more than one jurisdiction the predominance of group constellations is manifest (19). It is clear, however, that the multiplicity of jurisdictions involved in these cases cause an even increasing multiplicity of problems (20). Therefore, the Working Group constrained itself to recommending (240 through 254) cooperation between the involved administrators as well as judges (cf. recommendations 243 and 244) which, again, shall include the possibility to set up protocols. Further issues in cross-border cases are, i.a., the determination of the centre of main interests (COMI) of each one of the group members as well as the one of the group as a whole. Regarding the latter issue, reference is given to the NAFTA principles (21) which deal with cross-border cases in the NAFTA area; they provide that any affiliate may file a petition also with the court which is competent for the parent company (note that this court might be located in a different jurisdiction).

2.2. Germany

2.2.1 A rethinking

In Germany, the search for the practical design of a group related insolvency law has replaced the question for its need within the last few

(18) For them see Göpfert, „In re Maxwell Communications – ein Beispiel einer koordinierten Insolvenzverwaltung in parallelen Verfahren, ZZZPint 1, 1996, 296; Paulus, „Protokolle“ – ein anderer Zugang zur Lösung grenzüberschreitender Fälle, ZIP 1998, 977. A comprehensive list of such protocols is available at: www.iiiglobal.org/component/jdownloads/?task=viewcategory&catid=395.

(19) See just Westbrook / Booth / Paulus / Rajak (as fn. 17), p. 228.

(20) Regarding the international private law issues see, for instance, Kronke / Mazza, in: Kronke / Melis / Schnyder (eds.), Handbuch Internationales Wirtschaftsrecht, 2005, p. 1183 ff. (K points 179 ff.).

(21) See primarily Westbrook, Managing Defaulting Multinationals Within NAFTA in Foundation and Perspectives of International Law, 465-79 (2001); additionally Wessels, Insolvency Law 2006, p. 42 f.

years (22). The debate is not any more about the “whether at all” (23) but primarily about the “how”; after all, the advantages are evident in cases of a group’s reorganization (or parts of it) or the sale of the whole (or parts) of it. But, of course, the little detail-devil works here as well (24). What needs to be aimed at is the maximization of the estate (25) and, thus, an increase of the creditors’ satisfaction. After all, this is the primary goal of Germany’s insolvency law (26).

It is an open question whether or not this change of attitude towards a group insolvency law might lead in the future to an amended goal description of Germany’s insolvency law – namely, comparable to French law, the preservation of enterprises (27). At this point of time, however, the said change becomes visible through several incidents: the German Ministry of Justice has, thus, appointed an expert group for discussions about group insolvency law, the judiciary has quite recently decided more than one interesting case with having in mind the group relationship, and the amount of publications on this topic has increased dramatically.

The following presentation is helping itself from this growing body of thoughts, concentrating, though, exclusively on those which bear the potential of getting realized. This excludes primarily that area which is still met with a kind of knee-jerk reaction: substantive consolidation (28). Nevertheless, a closer view reveals that this attitude is an overreaction, as will briefly be demonstrated *infra* (sub C I); a more relaxed thinking through of the options unveils interesting possibilities.

(22) From the innumerable publications see just – apart from further references in the subsequent footnotes – Rotstegge, *Konzerninsolvenz*, 2007; Paulus, *Überlegungen zu einem modernen Konzerninsolvenzrecht*, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2005, 1948; idem, *Group Insolvencies – Old and New Approaches*, 42 *Texas International Law Journal* 2007, 819 ff.; Sester, *Plädoyer gegen ein materielles Konzerninsolvenzrecht*, ZIP 2005, 2099; Eidenmüller, *Verfahrenskoordination bei Konzerninsolvenzen*, ZHR 169, 2005, 528; Graeber, *Der Konzerninsolvenzverwalter – Pragmatische Überlegungen zu Möglichkeiten eines Konzerninsolvenzverfahrens*, NZI 2007, 265; Hirte, *Towards a Framework for the Regulation of Corporate Groups’ Insolvencies*, *European Company and Financial Law Review* (ECFR) 2008, 213; Uhlenbruck, *Von der Notwendigkeit eines eigenständigen Sanierungsgesetzes*, NZI 2008, 201, 205 f.; K.Schmidt (as fn. 11), KTS 2010, 1; Westphal, *Die Praxis der grenzüberschreitenden Konzerninsolvenz*, FS Görg, 2010, 569; Münchener Kommentar-Insolvenzrecht-Ehricke, 2. Aufl., *Internationales Konzerninsolvenzrecht*, Anhang an EGIInsO Art. 102.

(23) But see Ehricke, *Konzerninsolvenzrecht*, in: *Kölner Schrift zur Insolvenzordnung*, 3rd ed. 2009, Kap. 32 point 61.

(24) At this point a drawback of the German Insolvency Ordinance’s unitarian system turns up: It does not allow a 100 % prediction about the type of proceeding (rescue or liquidation); see already Paulus, *Konturen eines modernen Insolvenzrechts – Überlappungen mit dem Gesellschaftsrecht*, *Der Betrieb* (DB) 2008, 2523, 2525.

(25) For this, see just Wessels / Markell / Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters*, 2009, p. 25 ff.

(26) Cf. Paulus, *Europäische Insolvenzverordnung*, 3rd ed., Art. 1 point 3 (also about the differences in goal settings and pre-existing perceptions and the irritations which might result therefrom).

(27) But see also the Federal Court for Labor Law (Bundesarbeitsgericht = BAG): in its decision from 10.2.2009 – 3 AZR 727/07, ZIP 2009, 2213, 2215 par. 20, it uses the phrase „Schicksalsgemeinschaft“ (sharing a common destiny) for the members of a group in the context of a crisis.

(28) See just Sester (as in fn. 22); Staehelin, *No Substantive Consolidation in the Insolvency of Groups of Companies*, in: Peter / Jeandin / Kilborn (as in fn. 3), 213; recently K.Schmidt (as in fn. 11), KTS 2010, 1 (sub III 2 a).

2.2.2 *Particular topics*

2.2.2.1 *Debtor*

Concentrating exclusively on procedural consolidation implies the negation of “the group” being “the debtor” of the insolvency proceeding (29). Whatever might constitute a group, it is given that it cannot be subject to an insolvency proceeding. It is rather the individual group member that becomes insolvent and, thus, subject to a proceeding. Therefore, clarification needs to be given first what exactly is to be understood by procedural consolidation; after all, there do exist alternatives.

2.2.2.2 *Coordination light*

The first alternative is a limitation on mere coordination of the two or more proceedings following the model of art. 31 ff. EIR (30). This presupposes the determination of a hierarchy of the proceedings – for instance, the proceeding of the parent company as the main proceeding and those of the affiliates as secondary ones. The parallelism between national and international rules would be a manifest advantage of this option; after all, the coordination of proceedings emanates more and more as an essential in cross-border insolvency law (31). But – such a consensual and communicative model sounds more promising than it proves to be in quite many practical cases. After all, recommended (or, even more: imposed) cooperation requests capacity for teamwork from the administrators and, thus, their readiness to subordinate their own ideas to a certain degree. This might function in individual cases (depending on the characters of the participating administrators); but, as a general rule, this is the least ambitious step in the (admittedly) right direction.

2.2.2.3 *Coordination strong*

The other alternative is more ambitious: for instance the determination of a single competent court, the appointment of one administrator for more than one (or all) group related proceedings, as well as further measures connected with such a competence concentration (32). They do minimize the deficiencies in effectivity which are inevitably connected with the traditional separation of proceedings. After all, Germany has more than 180 insolvency courts with considerable (if not partially dramatic) differences as to the judges’ qualification in insolvency law and matters; corresponding thereto are the no less considerable

(29) But see the references at K.Schmidt (as in fn. 11), 1, KTS 2010, 1 (sub II 5).

(30) Similarly Piepenburg, *Faktisches Konzerninsolvenzrecht am Beispiel Babcock-Borsig*, NZI 2004, 231, 236. See additionally Dammann/Menjuq, Regulation No. 1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon, *Business Law International* 2008, 145, 156: „Cooperation has replaced confrontation.“

(31) See just Westbrook / Booth / Paulus / Rajak (as in fn. 17), p. 243 ff.

(32) For a list of these issues see Hirte, *Vorschläge für die Kodifikation eines Konzerninsolvenzrechts*, ZIP 2008, 444. From a practical stance Rennert-Bergenthal, *Konzerninsolvenz am Beispiel von Babcock-Borsig*, *Zeitschrift für das gesamte Insolvenzrecht (ZInsO)* 2009, 1316.

differences in the mode of appointing administrators. It might, thus, be even a problem to learn about the opening of a proceeding.

2.2.2.3.1 *Court competence*

The determination of a single competent court for all insolvent group members (33) is possible only when two problems are solved: what shall be understood as “group” in this context? (see below bb), and which are the criteria for such determination? Regarding the latter, the alternatives are either priority of the petition or the seat of one of the companies (34). If the seat solution were to be preferred, the determination of the parent’s seat (35) would be the quite obvious choice; after all, the pan-European striving and desire for utmost transparency and predictability of a court’s venue would be served best this way. A prominent example for this way is Spain with its *Ley Concursal* (36) from 2003 in art. 10 par. 4. However, this way carries with it a disadvantage which needs careful weighing: When and if the parent company is seated in a non-domestic jurisdiction the domestic law would declare that other jurisdiction to be *lex concursus* of the entire group’s insolvencies.

If one wants to avoid this disadvantage, the competence of that insolvency court could be determined where the first group related petition is filed. As a matter of fact, this, too, is far from being a sort of golden solution since such a priority principle presupposes this very court’s knowledge of the group relatedness and the knowledge of all other courts of that first petition. In order to get around this problem the group-competence concentration could be made dependent on the petition just and only from a group member itself, the so called voluntary proceeding. To achieve the benefit of such concentration the petition would have to make the judge aware of the group structure.

But even then (or maybe: particularly then) this priority principle might induce a strategic filing – or less neutral: it might be seen and used as an invitation to forum shopping. For those who are averse to such a possibility, one could think of introducing, for instance (37), a rule copying the Italian or French model pursuant to which the seat is to be determined in a time which is a certain period before the filing. To be sure, such a rule is threatened from a European verdict of nullity: after all, art. 3 par. 1 EIR determines the competence directly – i.e. without any recourse to national law. Therefore, it is somewhat dubious whether or not national legislation can modify or even alter this superior law (38).

(33) See, with many further references, Rotstegge (as in fn. 22), 394 ff.

(34) Critical K.Schmidt (as in fn. 11), KTS 2010, 1 (sub IV); idem, FS Ganter, 2010, 351, 357 ff.: he favors a solution based on reference (sub V). However, to this end (preliminary) administrators would have to be ready to refer „their“ proceedings to another court and administrator.

(35) Similarly Jaffé / Friedrich, *Verbesserung der Wettbewerbsfähigkeit des Insolvenzstandorts Deutschland*, ZIP 2008, 1849, 1851 ff.; or Leithaus / Riewe, *Inhalt und Reichweite der Insolvenzantragspflicht bei europaweiter Konzerninsolvenz*, NZI 2008, 598.

(36) Ley 22/2003, de 9 de Julio Concursal.

(37) Alternatively, one could think of introducing the objection of „forum non conveniens“.

(38) See already Paulus (as in fn. 26), Art. 3 point 16a.

2.2.2.3.2 *Group*

Similar difficulties might arise in the context of the clarification of what constitutes a group. As mentioned above, this is an issue which had been left aside at the UNCITRAL deliberations for quite some time due to its inherent intricacies. However, compared to them it appears to be easier to find an answer in the domestic context, since there usually does exist already a more or less precise understanding of this term. Accordingly, groups can be defined pursuant to s. 290 of the Trade Code (= Handelsgesetzbuch = HGB) which, after all, is based on European prescriptions (for that, see also below).

2.2.2.3.3 *Result*

To sum up, the preceding deliberations reveal that the existing rule in s. 3 of the German Insolvency Ordinance (= Insolvenzordnung = InsO) which up to now addresses an insolvency court's competence only with respect to single entities could easily be amended. All what is additionally required is the determination of (1) what constitutes a group and (2) which are the factors relevant for the court's competence.

2.2.2.4 *Appointment of ONE administrator*

Next to the centralization of the court competence is the appointment of just one administrator for all or several of the insolvent group members the most important tool for an effective procedural consolidation (39). A legislative permission, even though desirable in the face of a widespread attitude among judges that all what is not explicitly admitted is (or can be seen as) forbidden, should be easier to realize as various judges have already acted accordingly. They have either appointed the same administrator for several (or all) group related proceedings or they have at least appointed persons who are partners in the same law firm.

2.2.2.4.1 *Special examiner*

The main argument against the admissibility of the appointment of just one administrator is the danger that this person's neutrality is imperilled when it comes to the examination of inter-group relations (40). If, for instance, the avoidability of a parent-affiliate transaction is at stake the administrator represents both sides. It would not be per se erroneous to see this as a classical example of a conflict of interests which is to be avoided to the utmost extent possible.

(39) With further references Rotstegge (as in fn. 22), 171 ff.; additionally K.Schmidt (as in fn. 11), KTS 2010, 1 (sub VII 4). The Czech Republic, for instance, has introduced a corresponding rule in its new Insolvency Law from 2008.

(40) See Graeber (as in fn. 22), NZI 2007, 765.

The meanwhile well established remedy for this kind of problem would be the special examiner (Sonderinsolvenzverwalter (41)). However, if one were consistently sceptical the examiner would have to be appointed right from the opening of the proceeding and in practically all group related cases. As a consequence, the aspired increase of efficiency would be obsolete in the very moment in which it is intended to unfold. Given this inconsistency, it appears to be more logical to stick to the rule and not to destroy its benefits because of a general distrust. It seems, thus, to be advisable to rely on the given trust and to reserve the appointment of a special examiner solely for evident cases of conflicts (42). After all, in most – if not all – cases there will be a creditors’ committee which is also bound by law to survey and control the administrator. But all this does not interfere with the naturally given power of the administrator to request from the court to appoint a special examiner when and if (s)he deems it to be necessary.

2.2.2.4.2 *Several administrators*

But when it is evident right from the outset that the mere appointment of a special examiner will not do it is clear that several persons (possibly from the same firm) should be appointed. In order to mitigate the efficiency deficiencies resulting from such step it should be made obligatory that the coordination model of the artt. 31 ff. EIR is to be applied. This, in turn, presupposes that there is a hierarchy among the proceedings – i.e. there would have to be one proceeding the administrator of which has in particular the right to impose on the other administrators their modes of dealing with their estates. It appears to be a natural solution that such a leading position should rest on the parent’s administrator; even though this might not be in each and every case the ideal distribution of powers, in most cases it is likely to be. The abovementioned parallel to the European Regulation could, additionally, bring with it the right of the parent’s administrator to initiate plans – pursuant to the “plan proceeding” (43) – for the other proceedings. Therefore, here too, the question would arise whether or not a framing plan should be admissible for the entire group which will be fleshed up in each individual proceeding by individual plans. From a dogmatic point of view, nothing contradicts such a possibility.

2.2.2.4.3 *Lodging of claims*

When there is only one administrator appointed for the entire group (or parts of it) a critical situation – with respect to the abovementioned evidence – is the lodging of claims in the various proceedings. Since here the interests are bound to collide when, for instance, a recovery claim resulting from an avoidable intra-group transaction is at stake; the administrator can wipe out this claim by just refraining from lodging this claim in the debtor’s proceeding. Background of this

(41) For this institution Schäfer, *Der Sonderinsolvenzverwalter*, 2009; Frege, *Der Sonderinsolvenzverwalter*, 2008; see also Lüke, *Der Sonderinsolvenzverwalter*, ZIP 2004, 1693; Dahl, *Die Bestellung eines Sonderinsolvenzverwalters nach der InsO*, ZInsO 2004, 1014.

(42) Differing seemingly local court (Amtsgericht = AG) Duisburg, decision from 1. 9. 2002 – 62 IN 167/02, NZI 2002, 556.

(43) I.e. the German variant of the US Chapter 11 proceeding, s. 217 ff. InsO.

danger is the premise, of course, that the estates of each group member are to be reserved for just and only its creditors; in cases of substantive consolidation, such conflict can generally be neglected as there will be only one all-encompassing estate (but see also *infra* sub C I).

An obvious reaction to this conflict (on the interface of procedural and substantive consolidation) would be to declare the lodging of claims as one of those evident situations which requires in any case the appointment of a special examiner. However, the example of an intra-group claim which is ignored by the administrator for whatever reasons demonstrates that a special examiner, in order to be effective, would have to be granted comprehensive control and investigation powers so that this appointment would come close to the double appointment mentioned above. The alternative would be that the examiner has just control rights with respect to the lodged claims (as opposed to those as well which have not been lodged); then, of course, the appointment of such examiner is not indispensable and an *ipso iure* appointment can be renounced. Accordingly, the better solution seems to be the latter one.

2.2.2.4.4 *Result*

There are courts (or better: judges) that do already appoint one person for a multitude of group related proceedings. Therefore, a legislative confirmation of this practice is necessary only in order to convince those who still doubt the legitimacy of this practice. But it would be very helpful, in contrast, to provide legislative guidance with respect to the special examiner who is to be appointed in particular cases of conflict of interests. It should be made clear, however, that this controlling mechanism is not meant to be the supervisor for the entire proceeding (something like in soccer the “fourth man on the sideline”) but only for very special situations; whether the lodging of claims is such a situation – at least as a rule of thumb – is dubitable.

2.2.2.5 *Actio Pauliana*

With respect to inter-group transactions, the need for a special avoidance rule (*actio Pauliana*) is repeatedly emphasized. The background for such a request is the daily refreshed experience that, as a matter of fact, the acting persons within a group see the group more or less as a unit irrespective of its legal segmentation; accordingly, avoidable transactions – or at least transactions which were not possible in the same degree and kind outside a group relationship – occur every day by the thousands (44). It is this experience which formulates the alleged need for special rules.

(44) Regarding the avoidability of intra-group transactions Paulus, *Konzernrecht und Konkursanfechtung*, ZIP 1996, 2141, 2146; Ehrlicke, *Das abhängige Konzernunternehmen in der Insolvenz*, 1998, 15 ff.; Hirte, *Insolvenzanfechtung im Konzern: upstream guarantees als anfechtbare Rechtshandlungen*, FS Kreft, 2004, 307; Wenner/Schuster, ZIP 2008, 1512; Willemsen / Rechel, *Cash-Pooling und die insolvenzrechtliche Anfechtbarkeit absteigender Darlehen – Unterschätzte Risiken für Gesellschafter*, BB 2009, 2215; v.Bömmel, *Insolvenzanfechtung von upstream guarantees im GmbH-Konzern*, 2009.

Regarding Germany, however, it should be kept in mind that the “sword” of the *actio Pauliana* is already so sharp that there is no need for a special rule (*Tatbestand, fattispecie*) (45). But this does not exclude the possibility to clarify in s. 138 InsO – i.e. the already existing rule for the definitions of who is to be seen as a related person – that such relationship is not only given in a parent-affiliate connection but also among all members of a group. This would facilitate the application of the existing rules of s. 130 through 132 InsO (46).

One should understand, however, that when and if such a specified understanding of group members as being related persons became practised law a great step would be made in the direction of substantive consolidation. Since the descriptive and defining list of related persons is nothing else than a reflection of time-honored experiences with insider transactions among certain persons and constitutes, thus, something like an institutionalized distrust in these persons. As different as a wife might be from a company’s director or the grandparents from a general partner of a partnership: they share being seen by the legislator as persons who always tended (and still do) to be preferred recipients of transactions which turn out to be detrimental towards the general creditors and who are, therefore, discriminated by law.

Thus, when and if such a distrust is thought to be appropriate also among group members in general, the conclusion is inevitable that herewith corresponds the suspicion that the actual distribution of assets among the group members does not reflect their legally correct attribution to each individual member. It follows therefrom that the persuasiveness of the argument is diminished (to put it diplomatically) according to which creditors are to be satisfied exclusively from the estate of their debtor company. There is a discrepancy between this dogma and the general distrust in those internal transactions.

3. The Whereto

The two ways described *supra* designate an enormous progress compared with the situation as existent not yet ten years ago. This is particularly true with respect to the achievements of UNCITRAL when they are incorporated into the Legislative Guide. Nevertheless (or just because of that) the impatient question forces itself on one’s curiosity which further “places” one might or could reach on these ways in longer terms.

3.1. Substantive consolidation

It had already been aluded to *supra* that substantive consolidation is an anathema – at least within Germany. The admonition that thoughts about its feasibility should not persist in a simplistic white and black antagonism since

(45) See just Paulus, *Zur Auslegung anfechtungsrechtlicher Vorschriften*, FS G. Fischer, 2008, 445.

(46) A possible issue here might result from the need to determine the time from which on the suspect periods are to be calculated.

there could be innumerable in-between solutions (47) is ignored; obviously, the prevailing attitude is to fight the initial stages (48). The statement that the proof of the legal separation is in the emergency case of an insolvency of various or all group members (49) seems to be uncritically internalized as a dogma. After all, this statement provokes the question why and with which justification it assumes the non-insolvency period implicitly to be an area without (or with less) restrictions; insolvency law teaches through its *actio Pauliana* that it tries to revoke or annul just those transactions in that period (at least to a certain degree).

Prof. Hirte, however, undertook the endeavour to get away from this yes-or-no scheme and to develop some of the options possibly connected with a substantive consolidation (50). A brief description of his most important results might be in place here: He points out correctly that such consolidation by no means has to imply automatically a neglect of the juridical autonomy and independence of the group members. If, for instance, an affiliate would be included into the parent's proceeding, the creditors of that affiliate could be treated as privileged with respect to the assets (formerly) belonging to this entity. The principle of the *par condicio creditorum* needs not be correlated with the entire estate; it could also be realized just with respect to a part of this estate. The creditors of the various insolvent group members would have a position comparable to those who are secured creditors in a "normal" insolvency proceeding.

Incidentally, the latter comparison makes perfectly clear that the oft-quoted conflict of interest of a singular administrator in multiple group related proceedings is far from being abnormal and, thus, to be avoided by all means: Since it is part of the every-day-business of any administrator to decide on justifiability and legality of security rights – which implies antagonistic interests. In case that the consolidated proceeding were to be a plan proceeding one could think of the creditors of each insolvent group member forming a separate group (which might be subdivided into certain sub-groups for some voting issues).

The objections against these deliberations might be that such a modification of the substantive consolidation results, in the end, into nothing else than a procedural consolidation. However, as justified as this argument might appear on first sight, it turns out by a closer look that it is not: Since only in cases of substantive consolidation the possibility arises to have wiped out – totally or partially (see *supra*) – the intra-group-claims and to gain thereby the benefit of a

(47) See Paulus (as in fn. 22), ZIP 2005, 1949, 1953. Note that, for instance, in cases of domestic or cross border mergers the issue of creditors' protection is by far not a primary concern, cf. s. 22, 122j Conversions Act (Umwandlungsgesetz = UmwG).

(48) More balanced Skeel, Groups of Companies: Substantive Consolidation in the U.S., in: Peter / Jeandin / Kilborn (as in fn. 3), 229; Peter, Insolvency in a Group of Companies, substantive and Procedural Consolidation: When and How?, *ibidum*, 199.

(49) Cf. Lutter (as in fn. 2), ZfB 1984, 781; contra Albach, Betriebswirtschaftliche Überlegungen zur rechtlichen Neugestaltung bei Insolvenz von Konzernen, *ibidum*, 773. See additionally recommendations 226 ff. of the abovementioned UNCITRAL-work.

(50) Hirte (as in fn. 22), ECFR 2008, 213, 221 ff.; *idem*, Die Tochtergesellschaft in der Insolvenz der Muttergesellschaft als Verpfändung von „Konzern“-Aktiva an Dritte, FS K.Schmidt, 2009, 641, 644 ff.

massive reduction of the workload (51) and the usually therewith corresponding law suits. To be sure – these consequences are not carved in stone: they could, for instance, be modified by permitting the avoidability of intra-group transactions in order to maintain the appropriate attribution of assets to each one of the group members.

In sum, a substantive consolidation need by far not be the scenario of horror as which it is usually addressed. This is all the more true as it needs to be an automatic consequence of the opening of two or more group related insolvency proceedings; it could be offered as just one more tool in the box of insolvency law which can be applied for at court when and if the circumstances of the cases make it appear a preferable way of handling the affairs of the group. The ultimate guidance here would be, as mostly in insolvency law, the potential maximization of the estate and, thus, an increase of the creditors' chances to get satisfied through this proceeding (52).

3.2. Nexus of contracts

Finally, it is worthwhile to see in the present context anew the confirmation of the well-known phenomenon that as soon as one turns one's attention to a long neglected subject there show up on the horizon new problems, issues, and questions which were not be seen earlier due to the blindness on this spot. Whereas until now the connotations with a union of companies are usually the formation of a group, does practice turn more and more to looser forms of combinations (53) – to what is generally called nexus of contracts (Netzwerke) (54). After all, some argue that they are something like the backbone of the economy (55).

Whether this form of unionization of companies will cause one day in the future the insolvency lawyers' wrestling with this phenomenon like with the group insolvency law today cannot be foreseen at this point of time. However, the Italian legislator, having special regard to the rescue attempt of "Alitalia", has amended the "Decreto Marzano" by the Decreto 134 from 28.8.2008 by, i.a., broadening the understanding of what constitutes a group: namely those suppliers which are essential for the continuation of the enterprise's business and with whom Alitalia is connected through contracts (56). This description corresponds pretty much with what we nowadays understand to be a nexus of contracts.

(51) See just Rennert-Bergenthal (as in fn. 32), 1318 f.

(52) Overseen by Rennert-Bergenthal (as in fn. 32), 1316.

(53) For their contractual nature (rather than under company law) see Krolop, *Gewährung von Risikokapital auf schuldrechtlicher Grundlage als Herausforderung für die Einheit und internationale Anschlussfähigkeit des Privatrechts*, in: *Jahrbuch Junger Zivilrechtswissenschaftler* 2008, 29, 49 f.

(54) For them, see Lange, *Das Recht der Netzwerke*, 1998; Grundmann, *Die Dogmatik der Vertragsnetze*, AcP 207, 2007, 718; idem, *Welche Einheit des Privatrechts?*, in: FS Hopt, 2010, tom. I, p. 61, 76 ff.

(55) Vgl. Grundmann (previous fn.), 721 with further references.

(56) Cf. Carrara, *Alitalia and the italian insolvency law*, Eurofenix Spring 2009, 38.

4. Conclusion and outlook for the European Insolvency Regulation

Even though UNCITRAL and the discussion in Germany are moving on different ways do the results differ not too much upon closer inspection – and if they do this is owed to the different addressees. The most important commonality is the corresponding respect for the legal independence of the group members. The definition of what constitutes a group is as indispensable for both actors as the determination of the competent court. And one finds in both sets of thoughts the possibility to appoint one single administrator for the insolvencies of two or more group members – with the addendum of a potential special examiner.

All further thoughts and proposals are more or less accessories: This is, for instance, the adaptation of the *actio Pauliana* or the financing of the proceeding or the application for one or more group members. Irrespective of all the (admittedly sometimes intricate) problems the discussions of both UNCITRAL and Germany manifest that they are solvable. This should encourage the European legislator. After having so far excluded explicitly and purposefully the topic of group related insolvencies from its Regulation (57) it would be appropriate to address this issue in the upcoming report in 2012 (see art. 46 EIR). After all, a definition of the European understanding of a group does exist already in, for instance, the annex (par. 4) of the Commission Regulation (EC) No. 494/2009 of June 3, 2009 (58). It is hard to see why this understanding could not be used for the Insolvency Regulation as well. With respect to the competent court and the possibilities of procedural consolidation, the European legislator would be well advised to leave the details to the respective national legislator and to make reference thereto either in artt. 3 and 4 respectively or – even better – just to clarify in that report that national rules about these issues are to be subsumed under the Regulation. With a few additional words, the somewhat old-fashioned Regulation would be brought to the top of the present evolution.

(57) Cf. Virgós/Schmit report, par. 75. See Paulus (as in fn. 26), Einl. point 43: „Auslassungssünde“ (omission sin).

(58) Amending Regulation (EC) No 1126/2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Accounting Standards (IAS) 27. For the latter, see Commission Regulation (EC) No 1126/2008 of November 2008: adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council.

Grupos y concurso: las recomendaciones de UNCITRAL y el Derecho español

Juan Sánchez-Calero – Mónica Fuentes Naharro

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1. Introducción: la culminación de una labor importante

El interés y la oportunidad del estudio de la insolvencia de grupos son indudables desde una perspectiva internacional, en la que se producen avances tan importantes como los que ofrece la actualidad de CNUDMI. Muchas de las cuestiones que se abordan en esos trabajos a punto de culminar, presentan una notable importancia desde la perspectiva del Derecho español de la insolvencia.

Cuando la CNUDMI anunció que la labor futura de su Grupo V iba a concentrarse en la insolvencia de los grupos, advertí el interés de esa labor y de sus posibles resultados, sobre todo desde la perspectiva de un Derecho concursal en construcción como era el español (59). Han pasado más de cinco años y hoy ya parece inminente la aprobación definitiva de una nueva parte de la Guía Legislativa específicamente dedicada a la insolvencia de los grupos. Desde la perspectiva española, esa nueva parte de la Guía está llamada a tener una notable influencia en algunos aspectos del régimen de la insolvencia de grupos que hasta ahora no habían sido incluidos en nuestra normativa vigente.

2. Consideraciones preliminares

2.1. Los trabajos de la CNUDMI

Los trabajos de CNUDMI en materia de insolvencia de grupos se dividen en dos grandes apartados, separando la exposición y soluciones propuestas de lo que se llaman problemas domésticos, por un lado, y los problemas internacionales, por otro. Este trabajo se va a concentrar en la primera parte, poniendo en relación los avances introducidos en la Guía Legislativa de CNUDMI con el tratamiento de esas cuestiones en el Derecho concursal español.

Pero con carácter previo, deben formularse algunas consideraciones generales que alcanzan a todos los temas que se puedan proponer a partir de la ordenación de la insolvencia de los grupos por las legislaciones nacionales. Mencionarlas en este punto debe servir para establecer una suerte de marco general de la discusión, así como para dispensar de una continua referencia a ellas en los sucesivos apartados que se aborden. Antes de hacerlo, ha de subrayarse el acierto del método seguido por CNUDMI y sus recomendaciones legislativas con respecto a la dualidad de la insolvencia de los grupos de sociedades: cómo tratar a una empresa policorporativa dentro de un procedimiento que ha sido concebido normalmente a partir de la idea de que es un deudor individual el que lo protagoniza. Esa dualidad material y procesal de todo concurso no puede ignorarse, pues ambos aspectos se influyen y deben estar coordinados. Se habla con frecuencia de la coordinación procesal

(59) V. Sánchez-Calero, J., “La insolvencia de los grupos como posible labor futura de la CNUDMI”, ADCo 6, 2005, p. 339 y ss. Para una referencia sobre los trabajos que la CNUDMI venía desarrollando en materia de insolvencia, ver la crónica del Maestro Olivencia “El tema de la Insolvencia en la Agenda de Uncitral”, RDBB 62, 1996, p. 411 y ss; también el trabajo de Fernández de la Gándara, L., “La Ley modelo de Uncitral: una guía legislativa sobre el régimen de la insolvencia”, en *Comentarios a la Ley Concursal* (dirs.) Fernández de la Gándara/Sánchez Álvarez, 2004, Madrid-Barcelona, p. 815 y ss.

como uno de los principios recomendables en el concurso de grupos, pero lo cierto es que aquélla sólo será eficaz en el ámbito de las insolvencias transfronterizas si previamente se produce una aproximación de las reglas sustantivas que presiden la insolvencia de sociedades vinculadas.

Al valorar las propuestas de CNUDMI en relación con lo último, cabe proclamar cuatro consideraciones preliminares:

- 1^a A pesar de que se hable del grupo de empresas como de un concepto jurídico determinado, la realidad se encarga de recordar que la naturaleza y la estructura de los grupos es heterogénea, lo que obliga a afrontar cualquier aspecto de su régimen con la noción de flexibilidad como criterio imprescindible. Como pretender que la norma llegue a aprehender cuantos supuestos ofrece un grupo resulta vano, su insolvencia debe reservar un amplio ámbito a la contribución jurisprudencial, en línea con los principios diseñados dentro de la Guía Legislativa.
- 2^a Cuando se planteó en el seno de CNUDMI el problema del tratamiento de la insolvencia de los grupos no existía solamente una amplia conciencia de la falta de una adecuada regulación sustantiva de los grupos, sino de la conveniencia –por no hablar de la necesidad– de dar respuesta jurídica acorde con una realidad económica irrefutable: quien en sus relaciones con sus acreedores y clientes ha exacerbado la importancia de su pertenencia a un grupo, llegada la insolvencia reivindica la personalidad jurídica de cada una de las sociedades y la responsabilidad limitada de sus accionistas como inderogable regla que todos los protagonistas del concurso (juez, administradores concursales o acreedores) deben respetar. En ello late una sensación de injusticia, por la disparidad entre la actuación empresarial anterior al concurso y dentro de éste.
- 3^a La insolvencia total del grupo (de todos sus miembros) o la insolvencia en el grupo (de más o menos integrantes del mismo) sólo puede afrontarse y resolverse desde el adecuado entendimiento de lo que significan las relaciones del grupo, esto es, los aspectos positivos y negativos que suelen acompañar las relaciones patrimoniales, los contratos, la financiación o la adopción de decisiones, entre otros muchos aspectos, dentro del grupo. Lo que en una visión individual puede entenderse de una manera (por ejemplo, viéndola como lesiva para los acreedores externos) en la perspectiva del grupo puede cobrar un significado legítimo.
- 4^a Finalmente, la insolvencia de los grupos obliga a plantearse también la finalidad del concurso. Si se piensa en cualquiera de las soluciones (convencional o liquidativa) y se proyecta sobre el grupo en su conjunto, las dudas se acrecientan. Lo que para los acreedores de una sociedad insolvente supone un convenio admisible, para los de otra sociedad puede ser inaceptable y llevarles a impulsar la liquidación. Un acuerdo consolidado significa con frecuencia contemplar los efectos sobre las masas activas y pasivas de las distintas sociedades, e incluso, vincular a las sociedades solventes del grupo. No es fácil conciliar esa complejidad con la idea de la finalidad satisfactoria

del concurso. Sobre todo, porque los intereses de los acreedores a los que esa finalidad pretende tutelar, pueden ser no ya distintos, sino abiertamente contradictorios.

2.2. Los grupos en la vigente Ley Concursal española

El Derecho concursal español cuenta con una regulación moderna plasmada en la vigente Ley 22/2003, de 9 de julio, Concursal (en adelante, LC). Una Ley que cambió radicalmente el tratamiento de la insolvencia en nuestro ordenamiento, dando lugar a un tratamiento unitario de la insolvencia de cualquier deudor y confiando la tramitación del concurso a los nuevos Juzgados de lo Mercantil, creados en coincidencia con la promulgación de la Ley.

A pesar del escaso tiempo transcurrido desde la puesta en marcha de esa jurisdicción y de la entrada en vigor de la Ley Concursal (60), existe un relativo desencanto con relación a la aplicación de esa nueva disciplina ante el negativo panorama que ofrece el tratamiento de las insolvencias en España. Creo que esta crítica no está justificada por lo que se refiere a la calidad de la LC. Su aplicación aconseja revisar algunos de los planteamientos básicos que la inspiraron, pero los problemas actuales tienen su causa fundamental en la incapacidad de nuestra planta judicial para absorber los demoledores efectos de la crisis financiera y económica sobre la solvencia de particulares y empresas. Nuestros Juzgados no tienen capacidad para tramitar el número de concursos que se ha disparado (61). Ni siquiera tras la relevante ampliación del número de Juzgados mercantiles. De forma paralela, la LC viene siendo objeto de algunas reformas de distinto alcance (62).

Dado que contamos con una LC reciente, resultaba previsible que los grupos de sociedades merecieran alguna atención (63). Son varios los lugares

(60) Que se produjo el 1 de septiembre de 2004 conforme a la disposición final trigésima quinta LC.

(61) Para permitir una valoración de esa situación baste con comparar las cifras de 2005 (primer año de vigencia de la LC) y las de 2009. En el año 2005 se iniciaron 1001 concursos y en el año 2009, se tramitaron 5922 concursos.

(62) La amenaza de colapso de la jurisdicción mercantil ha inspirado algunas reformas limitadas de la LC. Destaca la que se produjo hace algo más de un año por medio del Real Decreto-Ley 3/2009, de 27 de marzo, que afectó sobre todo a los acuerdos de refinanciación. En las próximas semanas debería hacerse público el resultado del trabajo de una Comisión Especial creada por el Gobierno en julio de 2009 para una reforma de mayor alcance de la LC. Algunos medios de comunicación han señalado que entre las reformas que esa Comisión propondrá, figura la relativa al tratamiento de la insolvencia de grupos de sociedades.

(63) Al respecto, v. Duque Domínguez, J.F. “El concurso del grupo de empresas en la Ley Concursal” en AAVV Derecho Concursal, Estudio Sistemático de la Ley 22/2003 y 8/2003 para la reforma concursal, (dirs) García Villaverde/Alonso Ureba/Pulgar Ezquerro, Madrid 2003, p. 137 y ss.; Embid Irujo, J.M. “Grupos de Sociedades y Derecho Concursal”, p. 1885 y ss., y Ferré Falcón, J., “El grupo de sociedades y la declaración de concurso en la nueva normativa concursal”, p. 1931 y ss., ambos en AAVV *Estudios sobre la Ley Concursal. Libro homenaje a Manuel Olivencia*, Vol. II, Madrid, 2004; Sánchez Alvarez, M.M., “Grupos de empresas y el concurso de acreedores”, *Comentarios a la Ley Concursal*, cit., p. 737 y ss.; Sánchez-Calero, J., “Algunas cuestiones concursales relativas a los grupos de sociedades”, ADCo, 5, 2005, p. 60 y ss.; Alonso Ureba, A./Pulgar Ezquerro, J. “Relación de grupo y administrador de hecho en el concurso de sociedades integradas en un grupo”, RdS 29, 2007, p. 19 y ss. y Terreros, G. “Grupos de sociedades y concurso de acreedores”, ADCo 18, 2008, p.245 y ss.; Sebastián Quetglas, R., *El concurso de acreedores del grupo de sociedades, Cizur Menor, 2009*.

en los que se hace referencia al grupo de sociedades, si bien creo que la mayor parte de las veces en una perspectiva estrictamente procesal [a título meramente indicativo, en cuanto a la solicitud de declaración conjunta de concurso (art. 3.5 LC), la acumulación de concursos de sociedades de un mismo grupo (art. 25 LC) o en materia de determinación de la competencia judicial (art. 10.4 LC)]. Otras referencias directas al grupo las encontramos en materia de clasificación de créditos, puesto que se entiende que toda sociedad que forma parte del mismo grupo que la sociedad en concurso tendrá la condición de titular de créditos subordinados (art. 93.2, 3º LC). Por último, ha de subrayarse que la inclusión en la LC del concepto del administrador de hecho y la consiguiente atribución a éste de determinadas responsabilidades concursales afecta, sin duda, al grupo y, más concretamente, a la sociedad dominante a la que, en ocasiones, se podrá atribuir esa condición (64).

2.3. El concepto de grupo en la Ley Concursal

Sentado que son varias las menciones que dentro de la LC se hacen al grupo, resultan obligadas dos indicaciones adicionales. La primera, que no existe en nuestro ordenamiento concursal una definición de lo que constituye un grupo de sociedades (65). Es plenamente aplicable al ordenamiento español la descripción que realizaba la Secretaría de CNUDMI sobre el reconocimiento normativo de los grupos: en Derecho español no existe una disciplina específica de grupos, sino “reglas aisladas” que los mencionan (66). Esto hace que haya que acudir al concepto de grupo de preferente aplicación en el Derecho mercantil español, que es el que contiene el art. 42 del Código de Comercio (en adelante, CCo.), de inspiración esencialmente contable (67). La segunda afirmación tiene un mayor

(64) Sobre las dificultades de identificar el ejercicio del poder de dirección unitaria con la administración de hecho de una sociedad y la consiguiente atribución a la sociedad matriz o dominante de la condición de “administrador de hecho” V. Fuentes Naharro, M., *Grupos de sociedades y protección de acreedores (una perspectiva societaria)*, Cizur Menor, 2007, p. 249 y ss., en especial, 273 y ss., con amplias referencias a la doctrina española y extranjera; Alonso Ureba/Pulgar Ezquerro, cit. RdS 29, p. 19 y ss.

(65) La ausencia de un concepto de grupo viene siendo denunciada por nuestra doctrina desde la promulgación de la LC. Entre otros V. Embid Irujo, “Grupos de sociedades y derecho concursal”, cit., p. 1894 y ss.; Sánchez Álvarez, “Grupos de empresas y el concurso de acreedores”, cit., p. 753; Ferré Falcón, “El grupo de sociedades y la declaración...”, cit., p. 1936, quien no obstante expresa su preocupación por la posible derivación de un nuevo concepto de grupo en el ámbito concursal debido a la relación del art. 3.5 LC con términos como “identidad sustancial de sus miembros” y “confusión de patrimonios”; Sebastián Quetglás, *El concurso de acreedores del grupo de sociedades*, cit., p. 59, también se plantea esta cuestión y señala, a nuestro juicio acertadamente, que esos términos se limitan a expresar los presupuestos de aplicación del art. 3.5 LC, sin que tengan vocación universal para conceptualizar al grupo en este ámbito.

(66) V. Nota de la Secretaría, “Guía Legislativa de la CNUDMI sobre el régimen de la insolvencia. Tercera Parte: Trato otorgable a los grupos de empresas en situaciones de insolvencia”. (A/CN.9/WG.V/WP.92, de 10 de febrero de 2010), apartados 26 y 27, p.14

(67) Ha de indicarse que nuestro ordenamiento mercantil ha optado en los últimos años por convertir esa definición de los grupos en la aplicable en muy distintos sectores normativos. A título de ejemplo, cabe mencionar el art. 4 de la Ley 24/1988, de 28 de julio, del Mercado de Valores que, en virtud de su reforma del año 2007, renunció a su propia definición de lo que constituía un grupo de sociedades y que optó por la remisión al citado art. 42 CCo. Más recientemente, el Texto Refundido de la Ley de Sociedades de Capital aprobado por R.D.Leg. 1/2010, de 2 de julio, en su art. 18 hace lo propio, remitiendo la definición del fenómeno también a la contenida en el art. 42 CCo.

interés y es la que permite sostener que no existe en el ordenamiento español una regulación sustantiva de la insolvencia de los grupos de sociedades. Algunos intentos por aprovechar las referencias de inspiración esencialmente procesal al grupo en la puerta abierta para convertir al grupo en sujeto de un concurso a partir de la insolvencia de uno o varios de sus componentes, han fracasado (68).

La LC no ha ignorado la realidad económica y empresarial de los grupos de sociedades pero, en coincidencia con el diagnóstico que realiza la Secretaría de CNUDMI, concibe el régimen de la insolvencia de una sociedad pensando de manera preferente en una empresa individual que tiene y mantiene una personalidad jurídica propia. Mencionaré algunos de los criterios adoptados por nuestros Juzgados y Tribunales de lo Mercantil cuando han tenido que aplicar la LC a los grupos (69).

La falta de una disciplina específica de la insolvencia de los grupos no puede considerarse una laguna del ordenamiento concursal. El concurso de los grupos no cuenta con una regulación sustantiva como consecuencia de la falta en nuestro Derecho de sociedades de una disciplina, siquiera básica, del Derecho de grupos (70), que sirva como presupuesto para su correspondiente tratamiento concursal. Es notorio que la incorporación de las propuestas y recomendaciones de la Guía Legislativa a los ordenamientos nacionales dependerá en gran parte de esa relación con el Derecho de sociedades. Algunos problemas que aparezcan en el ordenamiento español es previsible que no se den o que encuentren una solución más sencilla en el ordenamiento alemán, por ejemplo, dado que éste cuenta con una previa regulación general del grupo de sociedades.

2.4. Un apunte estadístico

El Instituto Nacional de Estadística facilita una cuidada información concursal. De ella se puede extraer alguna referencia interesante a la hora de determinar en qué medida la insolvencia de grupos o de sociedades vinculadas

(68) Tanto la jurisprudencia como la doctrina de nuestro país coincide en rechazar el recurso a los arts. 3 o 25 de la LC como una vía para introducir en nuestro ordenamiento una extensión del concurso a aquellos miembros del grupo todavía in bonis o para admitir la consolidación patrimonial (también llamada “sustancial”) de las masas de las distintas sociedades del grupo declaradas en concurso. Sobre ambas cuestiones volveremos más adelante (v. infra. 4).

(69) Dada la juventud de la LC no podemos mencionar todavía una doctrina jurisprudencial en sentido estricto en materia de insolvencia de grupos. Hasta la fecha, el Tribunal Supremo sólo ha dictado alguna resolución incidental que luego se mencionará.

(70) Quizás el intento más nítido en esa dirección, que sin embargo fue finalmente abandonado, fue la Propuesta de Código de Sociedades Mercantiles, elaborado en el seno de la Comisión General de Codificación del Ministerio de Justicia, Madrid 2002, 250 pp. y que establecía distintas disposiciones en materia de publicidad registral, relaciones intragrupo, relaciones con los socios externos, contabilidad consolidada y, en particular, el principio de responsabilidad subsidiaria de la sociedad dominante por las deudas de sus sociedades filiales cuando la pertenencia al grupo se hubiere “hecho constar en la documentación o resultare de la publicidad su pertenencia al grupo” (art. 601.1). La necesidad de que nuestro legislador atienda a proporcionar un tratamiento global del grupo desde la que se considera su *sedes naturae*, el derecho de sociedades, es una constante entre nuestra doctrina especializada (por todos v. Embid Irujo, J.M., *Introducción al derecho de los grupos de sociedades*, Granada, 2003, p. 41).

a un grupo ocupa la realidad judicial española. Como puede comprobarse en el cuadro que sigue, el número de empresas concursadas que pertenecen a un grupo, aun siendo minoritario, es relevante. No sucede lo mismo con las sociedades en concurso que pertenecen a un grupo bajo control extranjero. No cabe afirmar que este supuesto es residual, dado que algunos de los concursos que han implicado a grupos con participación extranjera, han alcanzado una especial relevancia patrimonial y planteado problemas concursales de especial dificultad

	2006	2007	2008	Tres primeros trimestres 2009 (72)	Primer Trimestre 2010	Segundo Trimestre 2010
No grupo	792	778	2164	3236	1175	1090
Grupo español	56	96	348	423	187	18
Grupo no español	5	6	15	19	11	1

3. La primacía del criterio de la personalidad jurídica propia de cada sociedad

Pasemos a poner en relación algunos de los apartados de la Guía Legislativa que ha desarrollado el Grupo V de CNUDMI con la situación del ordenamiento español. Partamos de lo que cabe enunciar como los principios que presiden lo que se denomina la “Reglamentación de los grupos de empresas”, para señalar que prevalece entre nosotros el “criterio tradicional”. La personalidad jurídica independiente de cada sociedad perteneciente a un grupo es la regla de partida. En la perspectiva concursal, supone que el principio de la personalidad jurídica conlleva la regla de la autonomía patrimonial de los integrantes del grupo (72).

A favor del mantenimiento de esa regla juega la variedad de supuestos de vinculación societaria que la realidad ofrece. Adoptar un tratamiento normativo concursal común a todo tipo de grupos pudiera ser un error, pues como se ha señalado, y sería “procedente que se diera a un grupo sumamente integrado un trato distinto del que se da a un grupo cuyos integrantes conservaran un alto grado de independencia” (73). Dado que el concepto de grupo acoge una amplia variedad de situaciones, adoptar un criterio general prudente está justificado antes de dibujar cualquier posible excepción hacia los efectos patrimoniales delimitadores de la personalidad jurídica. Esto hace que el tratamiento de la insolvencia de una o más sociedades integradas en un grupo parta del tratamiento

(71) La nota de prensa del 4º trimestre del INE no aparta este dato.

(72) La independencia jurídica de las sociedades que componen el grupo constituye uno de los elementos conformadores o definidores del fenómeno: v. Girón Tena, J., *Las grandes empresas*, Valladolid, 1965, p. 124; Embid Irujo, *Introducción al derecho...*, cit., p. 29; Paz-Ares, C., en *Curso de Derecho Mercantil*, I, 2ª ed., 2006, p. 1474.

(73) Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartado 4, p.18.

separado de cada una de ellas y de sus patrimonios. Es una regla que parte de la normativa societaria, pero que permite una aplicación jurisdiccional correctora allí donde los Tribunales consideren que las circunstancias del caso (las del concurso, grupo y sociedad afectados) aconsejan una comunicación patrimonial. Esas excepciones no deben ser vistas siempre en clave de “favor creditoris”, puesto que la comunicación patrimonial entre sociedades vinculadas y dentro de sus respectivos procedimientos concursales puede favorecer los intereses tanto del grupo como los de cada uno de sus integrantes.

La regla general de la vigencia de la personalidad jurídica ha merecido por parte de los Tribunales españoles algunas excepciones, en las que se ha proclamado la responsabilidad del grupo frente a los acreedores sociales. Algunas de esas excepciones son conocidas y compartidas por muchos otros ordenamientos. Es lo que sucede principalmente con la doctrina del levantamiento del velo (74). Una segunda excepción más limitada, pues se inspira en la categoría de los acreedores favorecidos por el tratamiento patrimonial unitario del grupo, es la establecida por la jurisdicción social o laboral. Es una doctrina plenamente consolidada la responsabilidad del grupo frente a los trabajadores de cualquiera de sus integrantes (75).

Estas soluciones, diseñadas con carácter general desde el Derecho contractual, societario o laboral, son plenamente incorporables al ámbito concursal, en especial a través de la pieza de calificación del concurso, que permite pronunciamientos condenatorios que supongan, en definitiva, que la sociedad dominante u otras sociedades vinculadas con la que se encuentra en concurso, termine respondiendo frente a los acreedores por las deudas de ésta.

La traslación de los presupuestos y efectos de la doctrina del levantamiento del velo en el ámbito de los grupos de sociedades ha originado en el derecho comparado lo que podría calificarse como una suerte de “variante” de aquella doctrina, que ha recibido el nombre de “consolidación sustancial” en los Estados Unidos (substantive consolidation) o “apertura de procedimiento único” en Francia. El presupuesto común de su aplicación es que las sociedades del grupo en cuestión se encuentren sometidas a un procedimiento concursal. En tal caso, tanto la jurisprudencia estadounidense como la francesa (aunque en base a presupuestos no siempre idénticos), obvian la separación patrimonial de esas sociedades agrupadas, uniendo tanto sustancial como formalmente en un solo

(74) V., desde una perspectiva crítica: Embid Irujo, J.M., “Protección de acreedores, grupo de sociedades y levantamiento del velo de la personalidad jurídica (Comentario a la sentencia del Tribunal Supremo de 13 de diciembre de 1996)”, RdS 11, 1998, p. 363 y ss.; Fuentes Naharro, *Grupos de sociedades y protección de acreedores*, cit., p. 478 y ss.; y en “El levantamiento del velo en los grupos de sociedades como instrumento tuitivo de los acreedores: (Algunas reflexiones a propósito de la sentencia del Tribunal Supremo de 10 de marzo de 2005)”, RdS 28, 2007, p. 351 y ss.; Girgado Perandones, P., *La responsabilidad de la sociedad matriz y de los administradores en una empresa de grupo*, Madrid, 2002, p. 80.

(75) V. Fuentes Naharro, *Grupos de sociedades y protección de acreedores*, cit., p. 500 y ss., con cita de la jurisprudencia y doctrina laboral más relevante.

procedimiento los distintos concursos a que todas ellas se encuentran sometidas. Volveremos más adelante sobre estas cuestiones (76).

4. La coordinación procesal de los concursos de grupos

Lo que ha preocupado principalmente a la LC es dictar normas que hicieran posible la tramitación conjunta del concurso de dos o más sociedades pertenecientes a un mismo grupo. Así, los acreedores están legitimados para instar la declaración conjunta de concurso de esas sociedades vinculadas. Los requisitos que se recogen en el art. 3.5 LC permiten establecer los siguientes presupuestos de esa solicitud: (i) la declaración de concurso sólo puede instarse con respecto a sociedades vinculadas e insolventes o, lo que es lo mismo, no cabe utilizar la insolvencia de una sociedad para intentar atraer al concurso a las demás sociedades solventes pertenecientes al mismo grupo; (ii) se exige que la solicitud conjunta además de afectar a sociedades vinculadas, lo haga con respecto a aquellas en las que existe “identidad sustancial de sus miembros y unidad en la toma de decisiones”.

La segunda disposición procesal relevante es la referida a la acumulación de concursos. El primer supuesto en el que se admite esa acumulación de procedimientos es el de los grupos. Sólo la administración concursal nombrada en el procedimiento que afecta a la sociedad dominante de un grupo podrá solicitar del Juez la acumulación de los concursos ya declarados de otras sociedades pertenecientes al mismo grupo (77) (art. 25.1 LC).

Esta preocupación por la coordinación a nivel procesal de los concursos de sociedades de un mismo grupo también queda manifiesta en la Guía Legislativa de la CNUDMI, en especial en las recomendaciones 199 y siguientes.

4.1. La solicitud conjunta de apertura del concurso

La Guía legislativa ha previsto la posibilidad de que se tramiten de forma coordinada los concursos de dos o más deudores recíprocamente vinculados. Dentro de esa vinculación se piensa en el grupo de sociedades. La tramitación coordinada se puede plantear desde el momento inicial del concurso, admitiendo “la solicitud conjunta de apertura” del concurso para dos o más sociedades de un mismo grupo (78). Una solicitud que encuentra claros argumentos favorables, si bien también invita a su prudente formulación.

(76) V. *infra* 9.3.

(77) Esa legitimación está limitada a la acumulación de concursos ya iniciados. No supone la facultad de los administradores concursales de la sociedad dominante de su facultad de solicitar el concurso de una sociedad filial: v. Auto de la Audiencia Provincial de Barcelona (Sección 15ª), de 17 de marzo de 2008 (AC 2008, 986).

(78) Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartados 5 a 21 y las recomendaciones 199 a 201, pp.19 a 24.

No es dudoso que allí donde varias sociedades concursadas se encuentran en una situación de insolvencia, la apertura conjunta del procedimiento simplifica la tramitación al permitir al Tribunal responsable un adecuado examen de las causas de esa insolvencia y de aspectos esenciales del futuro concurso. Basta con considerar la influencia que la insolvencia de otras sociedades del grupo puede llegar a tener en la formación de la masa activa y pasiva. O que, ante la posibilidad de una solución convencional del concurso, la aprobación de los convenios relativos a cada sociedad se verá facilitada en virtud de la coordinación de los procedimientos.

En los grupos jerárquicos y en los que la financiación del grupo ha dependido esencialmente de la sociedad dominante, el concurso de ésta a partir de su insolvencia actual llevará a plantear que las sociedades filiales afronten su insolvencia inminente. Parece razonable que en interés de todos los acreedores del grupo y de los demás intereses vinculados con éste y con sus integrantes, se plantee la posibilidad de que se solicite la apertura del concurso sobre la base de una solicitud conjunta, que como se ha señalado acertadamente, tendrá el efecto de “alertar” al Tribunal (también a los administradores concursales y a los acreedores) sobre la relevancia que la existencia del grupo puede tener para la evolución del concurso. Permitirá, en consecuencia, adoptar algunas decisiones que agilicen la tramitación del concurso de cada una de esas sociedades, organizar sus fases de una manera coordinada y, en especial, designar a la administración concursal pensando en la necesidad de una actuación “consolidada”.

Ahora bien, la solicitud conjunta conlleva un riesgo fundamental. Su enunciación puede llevar a cuestionar de raíz el principio de la personalidad jurídica y de la autonomía patrimonial de las sociedades del grupo y a pretender desde ese momento inicial una suerte de consolidación o mancomunidad patrimonial. Esa pretensión la tendrán y ejercerán los acreedores, en particular los de las sociedades del grupo en peor situación patrimonial, que buscarán conforme a una elemental lógica económica que sus créditos sean satisfechos sobre otras sociedades del grupo.

Desde un punto de vista jurídico esa pretensión debe rechazarse de plano, ante todo porque pretende que el concurso se plantee ignorando su presupuesto esencial: que afecte a un deudor insolvente. La solicitud conjunta y voluntaria de concurso sólo puede presentarse con relación a sociedades que se encuentran o se van a encontrar en una situación de insolvencia (79). Cuando son los acreedores los que la presentan, tendrán que acreditar que las sociedades cuya declaración se solicita son actualmente insolventes. En otro caso, se estaría contradiciendo el principio de personalidad jurídica propia y, además, el presupuesto objetivo de todo concurso (art. 2 LC).

(79) Admite la solicitud el Auto de la Audiencia Provincial de las Islas Baleares (Sección 5ª) de 20 de octubre de 2008 (JUR 2009, 277485), que cita resoluciones anteriores del mismo Tribunal, mientras que la deniega el Auto del Juzgado Mercantil nº 1 de Alicante, de 13 de octubre de 2008 (JUR 2009, 184957).

La práctica concursal española ha permitido constatar la efectividad de ese riesgo. Como señalábamos, uno de los escasos preceptos concursales que contemplan el grupo de sociedades es el art. 3.5 LC, que permite a un acreedor instar la declaración conjunta de concurso de sociedades pertenecientes a un mismo grupo “con identidad sustancial de sus miembros, y unidad en la toma de decisiones”. Resulta obvio que esa solicitud sólo puede hacerla quien es acreedor común de las sociedades contra las que se dirige. Siendo un precepto esencialmente procesal, se ha intentado convertirlo en una norma material, que abría la puerta a la responsabilidad patrimonial del grupo, lo que ha sido rechazado inicialmente por nuestros Tribunales mercantiles. Esa es la orientación que acogen las nuevas recomendaciones 199 a 201 de la Guía Legislativa, donde expresamente se puntualiza que “una solicitud conjunta de apertura no afecta a la identidad propia de cada empresa del grupo incluida en la solicitud; cada empresa sigue siendo una entidad separada y distinta” (80).

Sin perjuicio del criterio acogido en las recomendaciones referidas, en los trabajos en el seno de CNUDMI no han faltado observaciones que plantean abiertamente la posibilidad de atraer a sociedades solventes al concurso de otros miembros insolventes del grupo, propugnando así, en definitiva, el recurso a una institución ya conocida como es la “extensión de la quiebra” que, si bien estuvo presente en algunos antiguos -y notorios- casos e, incluso, en un Anteproyecto legislativo (81), ha recibido el rechazo prácticamente unánime no sólo de la doctrina y jurisprudencia española, sino de nuestra propia Ley Concursal, que se ha decantado, como ya hemos señalado, por una normativa de acumulación y coordinación de concursos a nivel exclusivamente procesal.

Ciertamente, desde un punto de vista económico, puede aceptarse, como argumento de partida, que se inste el concurso del grupo también con respecto a sociedades solventes como forma de evitar que el saneamiento y la reorganización del grupo se vea repetidamente cuestionado por el hecho de que ciertas sociedades (las solventes) se quedan al margen de cualquier solución que se diseñe. Si, por ejemplo, un plan de refinanciación toma en cuenta en una fase preconcursal al conjunto del grupo ¿por qué no debe suceder lo propio con una salida concursal convencional que contempla el grupo como una unidad? La respuesta es sencilla: porque esa visión no será compartida con frecuencia por determinados accionistas y por los acreedores de las sociedades solventes, que reivindicarán el principio de la autonomía de la personalidad jurídica.

(80) V. Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartados 5 a 21 y las recomendaciones 199 a 201, p. 23; v. en especial la recomendación 200, que debe ser aplicada en relación con las recomendaciones 15 y 16 de la Guía Legislativa.

(81) Nos referimos a casos como el conocido de “Barcelona Traction” y al Anteproyecto de Ley Concursal de 1983. V. un detallado estudio de estas cuestiones en Miguens, H.J., “La ocupación de las sociedades filiales de la quiebra de la sociedad Barcelona Traction. Lecciones nuevas de un viejo caso concursal de grupos de sociedades en crisis en el Derecho español”, RDM 223, 1997, p. 319 y ss.; Sebastián Quetglás, *El concurso de acreedores del grupo de sociedades*, cit., p. 75 y ss., en especial, 140 y ss. Para un estudio de la institución de la extensión de la quiebra v. Miguens, H.J., *Extensión de la quiebra y la responsabilidad en los grupos de sociedades*, Buenos Aires, 1998, p. 90 y ss. y “Crítica y soluciones a los sistemas de extensión de la quiebra en los grupos de sociedades en el derecho comparado”, RdS 7, 1996, p. 132 y ss.

Para superar este obstáculo y justificar la posibilidad de instar el concurso de todo el grupo, se utilizan dos tipos de argumentos. El primero es esencialmente fáctico. La solicitud general de concurso de todo el grupo pudiera ser consecuente con circunstancias que revelan una estrecha integración patrimonial entre las sociedades del grupo, una estrecha relación de control o, por el contrario, que acreditan que el grupo es mera fachada y que lo que existe en realidad es, por ejemplo, una actividad comercial común a la que están sometidas por igual todas las sociedades del grupo (82). La segunda argumentación es jurídica y apunta al consentimiento unánime de todos los afectados (acreedores incluidos) como condición de la que dependerá que una sociedad solvente acepte acogerse a un procedimiento de insolvencia junto con las demás sociedades del grupo. Es manifiesta la dificultad del cumplimiento de esta condición.

Por lo que se refiere a cuál será el Tribunal competente para conocer una solicitud conjunta de concurso, el criterio que se apunta para determinarla (sea el concurso nacional o internacional) ya aparece en el art. 10.4 LC, que se fija en el centro de los intereses principales de la sociedad dominante (83).

4.2. La coordinación procesal de concursos de sociedades vinculadas

Lo que en la regulación uniforme de la CNUDMI sobre la insolvencia de grupos se describe como coordinación procesal tiene una clara justificación en el caso de los grupos de sociedades: el aumento de la eficiencia de las actuaciones en el marco del concurso y el ahorro de gastos (84).

En el Derecho español se habla de acumulación de concursos (art. 25.1 LC) y se hace con respecto a la situación de partida en la que estando la sociedad dominante en concurso, se permite a la administración concursal solicitar que se acumulen a ese procedimiento los concursos ya iniciados de otras sociedades del mismo grupo (85). Es una norma coherente con la regla que atribuía la competencia al Juez correspondiente al centro de los intereses principales de la sociedad dominante, que rige también en esta materia (art. 10.4, párrafo 2º, LC).

(82) V. Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartado 12, p. 21, que desarrolla estas hipótesis.

(83) V. Auto del Juzgado Mercantil nº 1 de Bilbao, de 4 de mayo de 2009 (AC 2009, 1159), que admite la solicitud conjunta de concurso de tres sociedades, siendo una de ellas húngara y situándose en España el centro principal de intereses; con relación a la definición del centro de interés principal de la sociedad dominante, v. Auto del Tribunal Supremo de 20 de febrero de 2009 (RJ 2009, 1476).

(84) V. Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., recomendaciones 199 a 201, en especial, apartados 22 y ss., p. 25 y ss., donde se señala que “la coordinación procesal tiene por objeto aumentar la eficiencia de las actuaciones y ahorrar gastos y puede facilitar no sólo la obtención de información completa sobre las operaciones comerciales de las empresas del grupo sujetas a un procedimiento de insolvencia, sino también la valoración de los bienes y la identificación de los acreedores y de otras partes con intereses jurídicamente reconocidos, así como evitar la duplicación de esfuerzos”.

(85) Auto del Juzgado Mercantil nº 3 de Barcelona, de 21 de marzo de 2006 (JUR 2006, 299860). Deniega la acumulación de concursos, por inexistencia de grupo, el Auto del Juzgado Mercantil nº 5 de Madrid, de 15 de enero de 2009 (AC 2009, 279).

La acumulación de concursos prevista en el art. 25 LC se trataría, como se ha apuntado, de una acumulación ex post de distintos procedimientos concursales ya declarados, mientras que la observada por el art. 3.5 LC se referiría a una acumulación de procedimientos ab initio (86). Ambas soluciones acumulativas, por tratarse de normas de carácter estrictamente procesal, determinarían la formación de masas activas y pasivas totalmente separadas en las que el tratamiento de los créditos intragrupo se resolverían por el trámite de la subordinación del art. 92 LC, al que más adelante nos referiremos (87).

La coordinación se adjetiva como procesal y con ello se señala que estamos ante reglas que buscan adaptar el procedimiento de insolvencia a la realidad del grupo de sociedades, pero sin que ello implique una alteración del principio de personalidad jurídica y consiguiente autonomía patrimonial de cada una de las sociedades. Así, con esta norma se busca evitar que una tramitación individual del concurso de cada una de las sociedades vinculadas determine una peor atención hacia los intereses de los respectivos acreedores e implique una mayor complejidad y un mayor coste del concurso.

La coordinación o acumulación puede contemplarse con respecto a distintos momentos del procedimiento de insolvencia. Admitida la posibilidad de una solicitud inicial de declaración en concurso de dos o más sociedades del mismo grupo, habrá de hacerse lo mismo con la posibilidad de solicitar que el tratamiento conjunto de la insolvencia de sociedades vinculadas, desemboque en distintos procedimientos concursales acumulados. Es previsible que la conveniencia de esa coordinación se ponga de manifiesto sólo una vez que los procedimientos concursales ya se han iniciado e, incluso, en un momento en el que alguno de ellos se encuentra avanzado y sólo la posterior iniciación del concurso de otra sociedad del grupo (en especial del que afecta a la sociedad dominante) hace ver la conveniencia de esa coordinación. Con respecto a este último supuesto se ha señalado con acierto que se corre el riesgo de que la solicitud de coordinación se haga en un momento tardío con respecto a alguna de las sociedades en concurso, en cuya tramitación ya se habrían completado distintas fases. En este caso, las ventajas de la coordinación procesal se desvanecen, al tiempo que se atisba con cierta claridad el riesgo de dilación que conlleva esa solicitud de coordinación. La solución que pudiera haberse adoptado, aunque se ha descartado en la Guía Legislativa, es la de establecer un momento o plazo del concurso a partir del que

(86) Esta posición ha sido asumida implícita o explícitamente por la mayor parte de los autores que han tratado los grupos de sociedades y el régimen de la acumulación: Rojo, A., “Legitimación”, en (dirs.) Rojo/Beltrán, *Comentario de la Ley Concursal*, Madrid, 2004, p. 197; Embid Irujo, “Grupos de sociedades y Derecho concursal”, cit., p. 1903; Sánchez-Calero, J., “Legitimación”, en (dirs.) Sánchez-Calero/Guilarte Gutiérrez, *Comentarios a la legislación concursal*, Valladolid, 2004, p. 141; Pulgar Ezquerro, J., *La declaración del concurso de acreedores*, Madrid, 2005, p. 795; Ferré Falcón, “El grupo de sociedades y la declaración de concurso en la nueva normativa concursal”, cit., p. 1946; Fuentes Naharro, *Grupos de sociedades y protección de acreedores*, cit., p. 498 y ss.; Sebastián Quetglás, *El concurso de acreedores del grupo de sociedades*, cit., p. 212.

(87) v. infra 8.

no cabe solicitar la coordinación (88). Probablemente esta medida habría limitado sustancialmente la capacidad de decidir de los Tribunales a la hora de evaluar si procede o no la coordinación.

Las medidas de coordinación procesal pueden ser distintas, pero quizás las más eficientes sean las que afectan a la administración concursal. Las opciones en este terreno pueden consistir en el nombramiento de los mismos administradores concursales en cada uno de los concursos, con lo que se asegura que éstos, al igual que el Juez ante el que se han acumulado los procedimientos, tienen una visión global de lo que significan las relaciones dentro del grupo, pueden evaluar mejor las causas de la insolvencia y, en fin, que pueden supervisar también de una manera más satisfactoria cualquier solución concursal que se proponga. La segunda opción pasa por nombrar en cada concurso distintos administradores concursales, si bien contemplando un deber de cooperación entre todos ellos que afectaría de manera principal al intercambio de información.

Al margen de esa coincidencia en la identidad de los administradores concursales o de la necesaria colaboración entre ellos, otra forma destacada de coordinación procesal vendría dada por la adecuación en el tiempo del desarrollo de los distintos procedimientos. Esto debe afectar de manera obligada a las fases de presentación y verificación de los créditos y a la coordinación de los procedimientos de impugnación. Mas esas medidas de coordinación no constituyen un catálogo tasado sino que parece conveniente dejar en manos del Tribunal ante el que se tramitarán los procedimientos acumulados el establecimiento de otras o similares medidas destinadas a hacer viable la coordinación de los distintos concursos acumulados.

En los trabajos de la CNUDMI se ha adoptado un criterio amplio a la hora de señalar las personas legitimadas para solicitar la coordinación procesal. Estos sujetos legitimados serían cualquiera de las sociedades del grupo afectadas por uno de los procedimientos de insolvencia, cualquiera de los administradores concursales designados y un acreedor (89). Con respecto a este último el criterio adoptado admite algún comentario. Se entiende que la solicitud la puede presentar un acreedor de una determinada empresa insolvente, es decir, sin exigir que esa condición la ostente frente a todas las demás sociedades a las que afectaría la coordinación procesal solicitada (90). Esta posibilidad puede plantear problemas

(88) Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartados 27 y 28 de las recomendaciones 199 a 201, pp. 26 y 27.

(89) El tenor literal del art. 25.1 LC es más restrictivo, otorgando dicha legitimación únicamente a los administradores concursales: “En los casos de concurso de deudor persona jurídica o de sociedad dominante de un grupo, la administración concursal, mediante escrito razonado, podrá solicitar del juez la acumulación al procedimiento de los concursos ya declarados de los socios, miembros o integrantes personalmente responsables de las deudas de la persona jurídica o de las sociedades dominadas pertenecientes al mismo grupo”. No obstante, como ya hemos señalado en otro trabajo (Sánchez-Calero Guilarte, “Algunas cuestiones concursales...”, cit. p. 46) “creemos que también debe otorgarse idéntica legitimación a cualquier sujeto que pueda ser considerado parte en los procedimientos cuya acumulación se pretenda, a quienes corresponderá en ese momento acreditar la procedencia de la acumulación (v. arts. 75 y 76 de la LECiv) (...)”.

(90) V. recomendación 206, c) y la nota 28 de la Guía Legislativa.

jurisdiccionales en materia de competencia similares a los que acompañan a la tramitación de la solicitud conjunta. Es lógico que el acreedor de la sociedad dominante solicite la coordinación o acumulación de los procedimientos si con ello consigue que la tramitación de la insolvencia del grupo termine correspondiendo a sus Tribunales nacionales. Esto implicará, por el contrario, una desventaja para los acreedores de una sociedad filial establecida en otro Estado, que ven cómo la coordinación procesal significa que el procedimiento de insolvencia se lleva en un Tribunal extraño a su jurisdicción. Podrá oponerse que puesto que la solicitud de coordinación deberá notificarse a los acreedores, éstos dispondrán de un trámite de audiencia, así como que una vez acordada la coordinación, ésta puede implicar el establecimiento de medidas de información y de publicidad que ofrezcan una adecuada tutela a todos los acreedores. Se habla así de la creación de un comité de acreedores o de la necesidad de publicación de anuncios vinculados con la insolvencia en determinadas publicaciones (91).

La coordinación procesal es cuestión harto delicada, en especial allí donde la insolvencia del grupo presenta ramificaciones internacionales. Por ello ha de subrayarse la importancia que tiene el reconocimiento a los Tribunales de una discrecionalidad suficiente para poder acceder o desestimar la solicitud de coordinación. No estará de más que en tal difícil decisión se adopten lo que podríamos llamar medidas de coordinación jurisdiccional previa, a las que se refiere la recomendación 207 cuando contempla la “coordinación del examen de una solicitud de coordinación”. Dentro de la libertad de apreciación y decisión de los Tribunales en esta materia ha de reconocerse la posibilidad de que la coordinación se acuerde de oficio, cuando el Juzgado competente para esa tramitación coordinada de las distintas insolvencias dentro de un mismo grupo considere que ello redundará en interés de los acreedores (92).

5. La eventual extensión a otros miembros solventes del grupo de los efectos de declaración de concurso de una sociedad vinculada

Desde la perspectiva del grupo, la insolvencia de alguno de sus integrantes suele ser vista como un factor de riesgo para los demás miembros del grupo por cuanto pudiera abrir paso a la pretensión de los acreedores de atraer al procedimiento de insolvencia a otras sociedades solventes. Más ese mismo hecho puede ser contemplado con temor por el motivo contrario, es decir, por ver las sociedades solventes que quedan fuera del ámbito de protección normativa que suele acompañar a la declaración del estado de insolvencia. Los efectos defensivos del concurso sobre la sociedad deudora y sobre las acciones de los acreedores harán que éstos vuelvan su atención hacia la posibilidad de conseguir

(91) Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartados 34 a 36, p.28.

(92) Así lo admite la recomendación 203 de la Guía Legislativa. V., también el Auto del Juzgado Mercantil nº 5 de Madrid, de 8 de septiembre de 2008 (JUR 2009\135724), que acordó la acumulación de oficio de los concursos de sociedades pertenecientes a un mismo grupo. Las sucesivas solicitudes de declaración concursal habían recaído en el mismo Juzgado quién tuvo ocasión de analizar la concurrencia del requisito de la identidad sustancial de sus socios y que, aún proclamando el carácter excepcional de esa acumulación de oficio, la entendió procedente “en interés de los acreedores”.

la satisfacción de sus créditos requiriéndola de otras sociedades del grupo. La situación típica que abona esta hipótesis es la de las garantías personales otorgadas por unas sociedades a favor de los acreedores de otras.

Esas consideraciones justifican que la Guía Legislativa se adentre en lo que describe como la extensión de la “paralización” a favor de las demás empresas solventes del grupo (93). Con ello se evita que los acreedores inicien procedimientos contra éstas orientados al cobro de las deudas que no pueden reclamar de la sociedad insolvente y en concurso. Es una medida que puede estar justificada allí donde la financiación del grupo esté basada en garantías o préstamos internos. La paralización de las acciones individuales de los acreedores frente al conjunto del grupo puede estar justificada desde la perspectiva de la recuperación o continuidad de las actividades de las sociedades insolventes. Si, por ejemplo, producido el concurso de la sociedad dominante y planteada una propuesta de convenio que se apoya financieramente en el patrimonio de las distintas filiales se permite, sin embargo, que los acreedores sigan ejercitando acciones individuales contra sus filiales garantes, se cuestiona la viabilidad del convenio.

Sin embargo, esa paralización no deja también de tener efectos contraproducentes por constituir una anomalía. Quienes son solventes se benefician de la tutela que el ordenamiento reconoce al deudor insolvente. La reacción de los acreedores de esa empresa solvente contra la que ya no podrán ejercer acciones individuales en tanto no terminen el concurso de otras sociedades del grupo, puede operar en sentido opuesto al pretendido. Ante la anomalía que implica la paralización, los acreedores revisarán las condiciones comerciales o financieras que venían aplicando a la empresa solvente.

Se plantea que la paralización pueda extenderse a sociedades del grupo ajenas al procedimiento de insolvencia en forma de medidas cautelares. No creo que esa vía encuentre acomodo en la vigente LC. Para empezar porque supone extender los efectos típicos del concurso sobre quien no sólo no es el deudor, sino además carece del presupuesto objetivo para su adopción.

Unas medidas de paralización que afectaran a otras sociedades del grupo resultarían difícilmente admisibles incluso desde la perspectiva de la defensa de los derechos fundamentales de las partes implicadas. Ni es comprensible la limitación de la libre administración de una sociedad solvente, ni lo es que el derecho de propiedad de ésta sobre su patrimonio se viera afectado por el concurso de un tercero, aún cuando estuviera vinculado con la sociedad en cuestión. La única hipótesis que permite extender los efectos del concurso a otra sociedad del grupo es la que establece el art. 48.3 LC, conforme a la que podrá ordenarse el embargo de bienes de otra sociedad del grupo a la que se considere administradora de hecho de otra sociedad en concurso y cuando se considere, bien por el Juez o por los administradores concursales, que el concurso será calificado como culpable y que la masa activa resultará insuficiente para cubrir las deudas.

(93) V. Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartados 39 a 46, p. 31 y ss.

Es un supuesto distinto en su fundamentación y en su alcance al que contempla la Guía Legislativa al hablar de la paralización de las sociedades solventes del grupo. Ésta requerirá para su efectividad, un expreso acogimiento normativo en el ordenamiento español.

6. La financiación por el grupo

6.1. Tras la solicitud de declaración de concurso y tras la apertura del procedimiento de insolvencia

Dado que las relaciones financieras y patrimoniales entre sus miembros son uno de los rasgos característicos de la mayoría de tipos de grupos, no resulta extraño que la Guía Legislativa se haya adentrado en los problemas que el concurso de sociedades vinculadas plantea a ese respecto. Se parte de un problema general y básico: la incidencia que los momentos iniciales del concurso pueden tener para la financiación de todo deudor y su impacto en la continuidad de su actividad.

Si nos concentramos en el período comprendido entre la presentación de la solicitud del concurso y la decisión judicial de apertura o iniciación del mismo, podríamos calificarla como la de la fase crítica. El deudor continúa requiriendo financiación y, a su vez, determinados acreedores pueden esgrimir pactos convencionales que les autorizan a dar por resuelto el contrato, lo que ha llevado a una expresa declaración en algunas legislaciones a favor de la vigencia del contrato aunque se solicite o se declare el concurso (por ejemplo, art. 61.2 LC). Mas la solicitud abre un período de incertidumbre que es manifiesto que debe resultar lo más breve posible. En la experiencia española, el colapso de los Juzgados mercantiles ha provocado que entre la solicitud y la apertura transcurran plazos incompatibles con la continuidad de la empresa afectada, de manera que lo que era una concepción inicial del concurso como vía de saneamiento del deudor con vistas a su continuidad, termina abocándolo a la liquidación, en gran parte como consecuencia de la falta de crédito padecida en esa fase de solicitud pendiente.

En el caso de los grupos, ese problema persiste, pero sus efectos negativos se acrecientan al poder alcanzar a las demás sociedades distintas de la que se encuentra en concurso. Si nos limitamos a analizar la incidencia en la financiación del grupo posterior a la solicitud, sucederá con frecuencia que esa se convertirá en la vía principal para el sostenimiento de la sociedad insolvente. Pero esa financiación puede afectar la solvencia de las financiadoras y, además, el tratamiento que esos nuevos créditos merecen en el futuro concurso no anima a su concesión. Los administradores de la sociedad dominante del grupo y los de las sociedades filiales tomarán en particular consideración los riesgos que conlleva el régimen de la rescisión concursal (94). Con especial atención allí donde contemplen como

(94) Sobre las acciones de rescisión concursal en el ámbito de los grupos de sociedades, concretamente, con relación a la sociedad matriz como “persona especialmente relacionada”, v. Sebastián Quetglás, *El concurso de acreedores del grupo de sociedades*, cit., p. 308 y ss., en especial, 332 y ss.

una posibilidad que las sociedades por ellos administradas terminen en concurso y se analicen las financiaciones concedidas a otras sociedades del grupo en esa fase post-solicitud, como una de las causas del agravamiento de la propia insolvencia. Lo dicho rige cuando la financiación se traduce en la utilización del patrimonio de una sociedad solvente para apoyar esa financiación post-solicitud (por ejemplo, autorizando la constitución de garantías reales en apoyo de la sociedad que ha solicitado su declaración de insolvencia).

Las mismas consideraciones y cautelas afloran allí donde la financiación intragrupo se proyecta sobre la fase posterior a la apertura. Si la existencia del grupo y la naturaleza de las relaciones financieras y vínculos patrimoniales entre sus miembros –solventes e insolventes– han quedado recogidos desde el momento inicial, ello debiera permitir a los administradores concursales comprender que esa financiación ha sido habitual con anterioridad al concurso y que, salvo que sea precisamente esa financiación uno de los factores de la insolvencia que deben corregirse, la continuidad de la empresa insolvente pasa por seguir dando continuidad a esas relaciones financieras, que suelen tener una importancia esencial para la continuidad de la sociedad concursada. Como señala la Guía Legislativa, algo tan previsible cuenta, sin embargo, con un muy parco reconocimiento legislativo (95).

La dimensión de un grupo, la estructura de control y la diversa naturaleza de las vinculaciones entre sus componentes influirán sobre la mayor o menor complejidad de problemas vinculados con esa financiación. Con frecuencia se plantean decisiones en el concurso que obligan a adoptar una visión que excede los límites patrimoniales del deudor. Esa financiación desde el grupo o hacia el grupo cobra sentido no sólo como forma de resolver la insolvencia de determinadas sociedades, sino de la continuidad del grupo como tal. Al resolver esa financiación recobra su trascendencia la información presentada junto con la solicitud conjunta y, más aún, la coordinación procesal. Por ejemplo, el análisis compartido por los distintos administradores concursales de la financiación que afecta a las sociedades en concurso y a otras del grupo y su consiguiente autorización aportarán un mayor grado de certeza a la conclusión y protección de esa financiación.

La existencia del grupo dota de racionalidad económica al planteamiento de la hipótesis en la que una empresa insolvente en situación concursal es requerida para contribuir a la financiación de otra empresa del grupo en igual situación. Que una empresa en situación de insolvencia pretenda asumir nuevas deudas sólo se puede explicar a partir de la vigencia de un concepto que también resulta determinante en el régimen de la insolvencia: el interés del grupo. Es este singular interés el que puede explicar que conceder financiación esté en directa relación con los intereses de la sociedad concursada, tanto en lo que se refiere a su continuidad, como a la conservación del valor de determinadas participaciones.

(95) Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartado 55, p. 35.

Una financiación de este tipo es excepcional y será bienvenida por unos acreedores y simultáneamente denostada por otros. Pero solo una adecuada interpretación del interés del grupo y una distribución equitativa de los perjuicios que esa financiación puede causar a corto plazo, con vistas a obtener beneficios en el largo plazo, permitirán llevar adelante esta opción (96).

La Guía Legislativa así lo señala (97), reconociendo que se plantean importantes problemas procedimentales. Éstos pasan por, en primer lugar, el criterio favorable o informe de la administración concursal señalando que esa financiación es indispensable para la mejor defensa del interés del concurso de la sociedad prestamista y, en segundo lugar, por obtener la autorización (judicial o de los acreedores) que establezca el régimen concursal aplicable. Este procedimiento puede operar en contra de la viabilidad de la financiación si, por su propia naturaleza, implica una sustancial demora. Tal sucede allí donde el Tribunal por razones de carga de trabajo o de la necesidad de cumplimentar una fase de audiencia, demora su resolución, así como cuando siendo necesaria la conformidad de los acreedores, el amplio número de éstos dilatan en el tiempo el citado trámite.

Aunque la prelación de los créditos del grupo es una materia que por su propia relevancia es objeto de un apartado específico (98), merece una referencia el rango que cabe reconocer a favor de estas financiaciones otorgadas por otras sociedades del grupo. La Guía Legislativa apunta distintas consideraciones con respecto a la clasificación de los créditos del grupo, subrayando que aun cuando su tratamiento subordinado es la forma más efectiva de atender a los intereses de los acreedores extraños al grupo, la simple pertenencia de un acreedor al mismo grupo de empresas que el deudor concursado “puede no resultar suficiente en todos los casos para justificar que se dispense un trato especial al crédito de esa empresa acreedora”. Por ello, propugna la Guía en sus recomendaciones 215 y 217 la necesidad de prever un mecanismo para determinar los tipos de conducta o las situaciones en que los créditos de las sociedades del mismo grupo merecerán una mayor atención (99).

(96) La búsqueda del difícil equilibrio entre el interés del grupo y el interés particular de cada una de las sociedades que lo forman representa una de las problemáticas más complejas que plantea el fenómeno: v. Fuentes Naharro, *Grupos de sociedades y protección de acreedores*, cit., p. 134 y ss., donde se plantean problemas y soluciones que, aunque se aborden desde la perspectiva del derecho societario -esto es, cuando las sociedades agrupadas se encuentran in bonis-, resultan en buena parte trasladables (sin perjuicio de las particularidades específicas del procedimiento concursal y de los intereses a que éste atiende), al contexto del procedimiento concursal.

(97) Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartado 63, p. 38.

(98) V. infra VIII.

(99) V. Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartados 84 a 88, pp. 47 y 48, donde señala expresamente que la subordinación “en algunos casos podría poner en peligro la viabilidad de la empresa subordinada del grupo y perjudicar no sólo a sus propios acreedores sino también a sus accionistas y, de haberse optado por una reorganización, al grupo de empresas en su conjunto. La adopción de una política consistente en subordinar siempre esos créditos puede además desalentar la concesión de créditos internos en el seno de un grupo”.

También creemos nosotros que la simple subordinación no es una respuesta inteligente si se quiere obtener del grupo (incluidas otras empresas también inmersas en procedimientos de insolvencia) una financiación que puede resultar esencial para la continuidad de la empresa. Parece por tanto que, como requiere la recomendación 215, habría que establecer una solución específica a ese tipo de créditos, desde luego más favorable que la mera y general subordinación que para los créditos del grupo establece el art. 92.5º, en relación con el art. 93.2, 3º, ambos de la LC, línea en la que también viene manifestándose buena parte de la doctrina española –si bien, se trata ésta de una cuestión no exenta de polémica– como tendremos ocasión de ver con más detalle (100).

6.2. Las garantías que aporta el grupo

La existencia del grupo y el reconocimiento del interés del grupo como un punto común que beneficia a todas las sociedades también se proyecta sobre la eventual aportación de garantías concedidas por sociedades vinculadas a favor de otra integrante del grupo que se encuentre en situación de insolvencia. De nuevo podemos imaginar que ese otorgamiento de garantías lo hagan empresas solventes o insolventes del grupo y que tal operación sólo resultará comprensible desde la obtención de lo que podríamos describir como beneficios indirectos vinculados con la continuidad y pervivencia del grupo en su conjunto. Una vez que se acepte la validez del otorgamiento de esas garantías reales o incluso personales, lo único que queda es someter su concesión al régimen de cautelas o salvaguardias establecidas en las recomendaciones 66 y 67 (101).

6.3. El riesgo de conflictos de intereses en la administración concursal de varias sociedades del mismo grupo

Todo grupo de sociedades es un campo abonado a las situaciones de conflictos de intereses. En el régimen de la insolvencia esto afecta de manera singular a la administración concursal allí donde siendo varias las sociedades vinculadas insolventes, los concursos se hayan acumulado o tramitado conjuntamente, con la designación de las mismas personas responsables de la administración concursal. Cuando nos planteamos las hipótesis de financiación dentro del grupo o de constitución de garantías reales o personales, también de naturaleza interna, se plantea de inmediato la dificultad de que ese mismo administrador concursal dé primacía a alguno de los intereses en conflicto.

Las soluciones propuestas por la Guía Legislativa pueden ser varias. Una primera pasaría por la aprobación del Tribunal o por el consentimiento de los acreedores, aunque esto puede ser sumamente complejo y supone desplazar la

(100) V. *infra* 8.

(101) Se trata de recomendaciones que regulan cuestiones relativas al otorgamiento de una garantía real para la concesión de fondos tras la apertura de un procedimiento y que, aun cuando no han sido dictadas específicamente para los grupos, “serían generalmente aplicables en el contexto de un grupo de empresas”: V. Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartados 72 y 73, pp. 40 y 41.

decisión a quienes pueden no tener una completa valoración de los intereses en juego o que, por el contrario, priman ante todo la defensa de sus particulares intereses. La segunda solución pasa por la designación a esos efectos de determinados auxiliares de la administración concursal o de administradores concursales con un mandato limitado a ese respecto (102).

7. La rescisión de las operaciones del grupo

En el régimen de la insolvencia del grupo de sociedades, la posibilidad de impugnar o ejercitar acciones de rescisión o reintegración, requiere también una particular ponderación. No es fácil alejar de la existencia del grupo de sociedades la sospecha de que, ante el concurso de alguno de sus miembros, en el seno del grupo se hayan podido adoptar decisiones y ejecutar operaciones tendentes a un mejor posicionamiento de las sociedades vinculadas en el futuro concurso, a un desplazamiento patrimonial desde la sociedad insolvente hacia otras sociedades del grupo o, en suma, otras situaciones que pueden ser vistas como perjudiciales para la masa activa.

Esa presunción suele reflejarse en los regímenes de la insolvencia cuando se menciona expresamente como acto perjudicial para la masa activa y por tanto rescindible, cualquier operación realizada en el periodo de sospecha previo a la declaración de concurso (los dos años que fija el art. 71.1 LC), entre el deudor y una persona especialmente relacionada con él. Es lo que hace el art. 71.3, 1º LC, que introduce una presunción iuris tantum de perjuicio patrimonial en cualquier operación en la que hayan intervenido esas partes (103).

Esa desconfianza del legislador concursal debe ser adecuada a la problemática especial de los grupos de sociedades. En primer lugar, porque las operaciones realizadas entre la sociedad en concurso y el grupo, habrán sido en muchos casos habituales y su realización en la fase inmediatamente previa al concurso no habrá presentado condiciones distintas de las que se venían realizando con anterioridad. En segundo término, porque esas operaciones no sólo no son frecuentes, sino que además, puede afirmarse que están plenamente integradas en lo que son los actos ordinarios de la actividad empresarial de la sociedad concursada. Esta circunstancia es la que lleva al art. 71.5 LC a excluir de la rescisión esos actos, previsión que también rige con respecto a los grupos.

En general, como señala la Guía Legislativa, el problema en este punto pasa por la búsqueda de una solución que resuelva el problema que el grupo de sociedades presenta a la hora de admitir las impugnaciones o rescisiones de las operaciones concertadas en su seno. Como señala de manera precisa “algunas operaciones tenidas por legítimas en el seno de un grupo de empresas pudieran no estar comercialmente justificadas fuera de ese contexto, si se analizan a la luz de

(102) V. Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartados 68 y 69, con referencia a las recomendaciones 52 a 63, p. 39.

(103) V. Sebastián Quetglás, *El concurso de acreedores del grupo de sociedades*, cit., p. 308 y ss., y doctrina por él citada.

las condiciones comerciales normales” (104). Una vez más, la necesidad de una adecuada interpretación de lo que significa el funcionamiento del grupo en sus aspectos comercial, financiero o patrimonial es un presupuesto necesario para no aplicar, sin más, la posibilidad de impugnación de operaciones por el mero hecho de haberse concertado en el seno del grupo. Como indica la recomendación 217, debería de existir una previsión legislativa que autorice al Tribunal competente para resolver cualquier acción de impugnación, analizar diversas circunstancias que permitan determinar si se está ante una operación razonable en términos económicos empresariales y que, por tanto, su validez y eficacia no deben ser cuestionadas o si, por esas mismas circunstancias, la rescisión está fundamentada (105).

8. La subordinación de créditos

La Guía Legislativa, aun cuando recomienda que en el régimen de la insolvencia no se subordine ningún tipo de crédito (106), sí aporta algunas interesantes reflexiones sobre la aplicación de la institución de la subordinación en el marco de los grupos. A este fin, analiza los dos supuestos que tienen especial relevancia en el contexto de los grupos, los créditos presentados por personas “allegadas” al deudor y los presentados por propietarios y accionistas de la empresa deudora, adoptando una postura clara respecto a la aplicación de la institución: entiende necesaria la preexistencia de un presupuesto de conducta indebida por parte del acreedor subordinado (107) en tanto la automaticidad en la aplicación de la institución “podría poner en peligro la viabilidad de la empresa subordinada del grupo y perjudicar no sólo a sus propios acreedores sino también a sus accionistas y, de haberse optado por una reorganización, al grupo de empresas en su conjunto. La adopción de una política consistente en subordinar siempre esos créditos puede además desalentar la concesión de créditos internos en el seno de un grupo” (108).

El estudio de la subordinación de créditos en el contexto de los concursos que afectan a los grupos de sociedades tiene especial interés desde la perspectiva del derecho español. Y es que, nuestra LC ha positivizado por primera vez en nuestro ordenamiento la aplicación de esta institución en nuestro país, declarando *iuris et de iure* la postergación automática de todos los créditos de que las sociedades

(104) Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartados 75 a 82, con referencia a las recomendaciones 87 a 99, pp. 43 a 46, y recomendaciones 217 y 218.

(105) La recomendación 217 menciona las siguientes circunstancias: “Entre las circunstancias cabe mencionar: la relación entre las partes en la operación el grado de integración entre las empresas del grupo que hayan intervenido en la operación; la finalidad de la operación; si la operación ha contribuido al rendimiento comercial del grupo en su conjunto; y si, gracias a la operación, las empresas del grupo u otras personas allegadas han obtenido una ventaja que normalmente no se otorgaría entre partes no allegadas”. [Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., p. 49]. Se trata en definitiva de valorar y sopesar si en la realización de esa operación se ha tenido o no en cuenta el interés del grupo.

(106) Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartado 91, p. 49.

(107) Así habla de la necesidad de que exista un “mandamiento judicial dictado a resultas de alguna conducta indebida de un acreedor o de alguna persona allegada al deudor, en cuyo caso cabrá subordinarlo a los créditos de los demás acreedores”, V. Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartados 83 a 91, pp. 47 a 49.

(108) V. Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartado 88, p. 48.

pertenecientes al mismo grupo que la concursada puedan ser titulares (cfr. arts. 92.5º, en relación con el 93.2, 3º). Se trata ésta de una disposición que ha generado bastante polémica entre nuestra doctrina, ya que, como hemos manifestado en otras ocasiones con anterioridad, puede ser cuestionable que esa solución no deba ser parcialmente revisada ante la insolvencia del grupo de sociedades (109).

A diferencia del régimen introducido por nuestra LC, la institución de la subordinación de créditos de sociedades de un mismo grupo, presente también desde hace ya décadas en otros ordenamientos de referencia en el estudio del fenómeno de los grupos de sociedades (v.gr., EEUU, Alemania e Italia) (110), se encuentra vinculada, bien a un supuesto de infracapitalización nominal, bien a la presencia de una conducta fraudulenta -o cuando menos, inequitativa o irregular- por parte del acreedor cuyo crédito se posterga. Sin embargo, su positivización en el derecho concursal español (siguiendo la línea marcada por el art. 312.1 del Borrador de Anteproyecto de la LSRL, que ya había previsto incorporar esta medida en unos términos prácticamente idénticos) no atiende a esta última circunstancia, sino que aplica la institución de forma automática a todos los créditos otorgados por las sociedades del mismo grupo que la concursada, en tanto de todas ellas se puede predicar la –única- condición subjetiva que exige la norma para ser aplicada: tener una “especial relación con el deudor concursado”.

Las reacciones doctrinales ante la configuración automática de la postergación, tanto en lo que se refiere a la trascendencia de su aplicación en el seno de los grupos como en otros contextos (no olvidemos que la postergación también afecta a los créditos de cualesquiera otras personas “especialmente relacionadas” con el deudor (111)), se encuentran bastante enfrentadas: por un lado se acusa a la norma de estar impregnada de una automaticidad bastante “radical” que prescinde por completo de la necesidad de tener en cuenta la capacidad de crédito de la sociedad subvencionada en el acto de la concesión del préstamo (112); por otro lado, sus defensores justifican lo acertado de su automaticidad argumentando que ese mayor riesgo –la postergación- al que quedan expuestos los sujetos vinculados al deudor se corresponde “a la mayor información de la que disponen o que están en grado de obtener”, añadiendo a su razonamiento un argumento de “ahorro

(109) En este mismo sentido crítico ya nos hemos manifestado en Sánchez-Calero Guilarte, “Algunas cuestiones concursales relativas a los grupos de sociedades”, cit., p. 47 y ss.

(110) Puede verse un estudio de derecho comparado en Fuentes Naharro, *Grupos de sociedades y protección de acreedores*, cit., p. 378 y ss.

(111) La norma también se aplica a los créditos de otros sujetos como los administradores y liquidadores de la sociedad, los socios ilimitadamente responsables o con una participación sustancial en el capital, etc. (véase el art. 93 LC).

(112) De “radical” tacha la doctrina comparada a nuestra norma: V. Portale, G., “Grupos y capital social”, RGD, 1996, p. 8449, si bien en relación con el citado artículo 312.1 del Borrador de Anteproyecto de LSRL, que, como decíamos, apuntaba un contenido prácticamente idéntico a éste. Por su parte, nuestra doctrina, en sentido crítico, denuncia que esta medida “se basa simplemente en la relación de cercanía o vinculación con el deudor, sin atender a la causa de su crédito ni a las concretas razones que han motivado su nacimiento, o la conducta de los titulares de esos créditos”: V. Alonso Ledesma, C., (art. 93) en *Comentarios a la legislación concursal*, tomo I, Madrid, 2004. p. 929.

de litigiosidad” (113). Se dice así que la postergación legal de créditos impuesta por nuestra LC responde, no a la concepción societaria de la institución (que se encuentra vinculada, fundamentalmente, a la “lucha” contra la infracapitalización nominal), sino a la concepción concursal, basada en el antiprivilegio, concepciones ambas que, como se ha señalado autorizadamente, son antagónicas (114).

De esta forma, para nuestro legislador concursal, los créditos intragrupo deben ser postergados en función de la mera proximidad o cercanía de las sociedades del grupo a la sociedad deudora, sin atender a que haya existido comportamiento irregular alguno por su parte (ni derivado de la concreta política de financiación de la sociedad concursada, ni derivado siquiera de un hipotético ejercicio dañino de la dirección unitaria sobre dicha sociedad). Se trata por tanto de una opción de política legislativa que parte de un apriorismo: cualquier financiación otorgada por un miembro del grupo de sociedades a que pertenezca la concursada adolece de carácter fraudulento o, cuando menos, irregular (115).

Sin embargo, esa “criminalización” apriorística de los créditos intragrupo que nuestro legislador concursal lleva a cabo no nos parece la crítica más reproachable que se le puede hacer al precepto. Antes al contrario, resulta a nuestro juicio comprensible –incluso, conveniente– que en un contexto de crisis societaria se presuma que las personas especialmente relacionadas con el deudor se han beneficiado en algún modo de su condición y cercanía con éste, a expensas del perjuicio de otros acreedores (116); tampoco debemos obviar la

(113) Garrido García, J.M., en *La reforma de la legislación concursal* (Jornadas), Rojo Fernández-Río (dir.), Pons, Madrid-Barcelona, 2003, pp. 242 y 243, señala que “teniendo en cuenta las peculiaridades de nuestro sistema judicial, parece más apropiada una solución objetiva que la introducción de normas que requieran un correcto ejercicio de la discrecionalidad judicial”; y confirmando su postura, tras la entrada en vigor de la reforma, en (art. 92) *Comentario de la Ley Concursal*, (dirs.) Rojo Fernández-Río/Beltrán, Madrid, 2004, p. 1666.

(114) Sobre ambas concepciones V. Rojo Fernández-Río, a., “Disolución y liquidación de la sociedad de responsabilidad limitada”, en VV.AA., *La futura ley de sociedades limitadas*, La gaceta de los negocios, Madrid, 1993, pp. 57 y 58.

(115) Así, como acertadamente se ha señalado, esta subordinación automática, al no atender a otras causas, parece “descansar en la idea de protección de los acreedores externos (en el caso que nos ocupa, los no pertenecientes al grupo) en detrimento de los acreedores internos (los pertenecientes al grupo) presuponiendo que siempre y en cualquier circunstancia éstos actúan de manera dolosa o con ánimo defraudatorio de los intereses de los restantes acreedores lo que, realmente, es totalmente excesivo. Y ello porque la subordinación, en la medida en que representa una excepción negativa, sólo debería operar cuando exista una situación de patente injusticia entre los acreedores internos y los externos por la situación de información asimétrica que se produce, pero no en toda circunstancia”: Alonso Ledesma, (art. 93) en *Comentarios a la Legislación Concursal...*, cit., p. 929. También críticos: Sánchez-Calero Guilarte, “Algunas cuestiones concursales relativas a los grupos de sociedades”, cit., p. 47 y ss.; Largo Gil, r.,/Hernández Sainz, E., “La imputación de la responsabilidad civil en el seno de los grupos de sociedades”, AA.VV., *Descentralización productiva y responsabilidades empresariales*. El “outsourcing” (dirs.) Rivero Lamas/De Val Tena, Navarra, 2003, p. 405 y ss., en especial, p. 424; Hidalgo García, (art. 93), en *Comentarios a la legislación concursal*, (dirs.) Sánchez-Calero Guilarte/Guilarte Gutiérrez, cit., p. 2054.

(116) Nadie puede poner en duda que las sociedades del grupo tienen, al igual que los socios, una condición de insiders, que favorece su posición entre los acreedores, sea mediante la obtención de privilegios sobre los activos sociales para garantizar sus créditos, sea mediante su cancelación total o parcial con preferencia a los demás en cuanto se tiene la certeza de que el naufragio es irremediable (a esa condición de insider, pero con referencia al socio: Massaguer Fuentes, “La infracapitalización: la postergación legal de los créditos de los socios”, en *La reforma de la sociedad de responsabilidad limitada*, (coords.) Bonardell/Mejías/Nieto, Madrid, 1994, p. 948.

difícil carga de la prueba que ha pesado siempre sobre el acreedor que demanda la subordinación del crédito de otro (117). Sin embargo, aun teniendo presente ambas argumentaciones, la opción de nuestro legislador por la automaticidad no se comprende: simplemente bastaba incorporar al precepto una presunción *iuris tantum* de que en los créditos de esas personas especialmente relacionadas concurrían circunstancias que justificaban una disparidad de trato como la prevista por la norma para atender a las necesidades tuitivas ya referidas de aquellos que no carecen de ese vínculo o especial relación de cercanía con el deudor concursado.

A la vista está que nuestro derecho concursal ha asumido una concepción “patológica” de las relaciones financieras entre las distintas sociedades del grupo y, como ya apuntábamos, a nuestro juicio esta opción de política legislativa es criticable porque en la práctica, la política financiera unificada de los grupos es una de las grandes ventajas que aporta el fenómeno, y el comportamiento de las sociedades del grupo -en tanto financiadoras- puede ser claramente beneficioso para el deudor (v. gr. otorgándole créditos sin intereses o a un interés muy bajo, en condiciones de devolución fáciles de asumir, etc.). Con la nueva legislación concursal española, los créditos de estas sociedades se van a ver postergados aun cuando no hayan sido concedidos en un momento de situación empresarial crítica en el que, en efecto, los miembros del grupo se hubiesen valido de su posición privilegiada de insiders respecto de la sociedad prestataria, para garantizarse un mayor rango y un efectivo cobro futuro ante la -para ellos previsible- declaración de concurso de la sociedad (118) (fin al que supuestamente atiende la norma). Así, la falta de una presunción *iuris tantum* a la que antes nos referíamos -y la correspondiente imposibilidad por parte de la sociedad acreedora cuyo crédito se posterga de poder refutar dicha presunción- desconecta la fundamentación jurídica que se presume informadora del precepto de lo que resulta ser su aplicación efectiva, ya que producirá sus efectos con independencia de que tales sociedades hayan hecho uso fraudulento (o simplemente, si se quiere, privilegiado) de su cercanía al deudor concursado en detrimento o perjuicio de los acreedores “externos”.

En definitiva, no cabe duda de que la subordinación general de todo crédito del que resulte titular cualquier otro miembro del grupo de sociedades aporta seguridad jurídica y no obliga a una revisión de ciertas financiaciones intragrupo que no merecen la subordinación salvo que se equiparen por resolución del Juez del concurso a una aportación de capital. Más desde el punto de vista económico, la subordinación normativa de todos los créditos del grupo implica riesgos. El primero es el que afecta a la viabilidad de las sociedades vinculadas acreedoras, cuya estabilidad y solvencia pueden verse amenazadas a partir de la perspectiva

(117) Portale, “Grupos y capital social”, cit., p. 8441.

(118) Nadie puede poner en duda que las sociedades del grupo tienen, al igual que los socios, una condición de insiders que favorece su posición entre los acreedores, sea mediante la obtención de privilegios sobre los activos sociales para garantizar sus créditos, sea mediante su cancelación total o parcial con preferencia a los demás en cuanto se tiene la certeza de que el naufragio es irremediable (a esa condición de insider, pero con referencia al socio: Massaguer, “La infracapitalización: la postergación legal de los créditos de los socios”, cit., p. 948).

del muy difícil cobro de sus créditos. El segundo riesgo cierto que plantea la subordinación general y automática nos devuelve al estudio de la financiación pre y post concursal. No existe ningún incentivo entre los miembros del grupo para que aporten recursos financieros a la sociedad insolvente. Con ello lo que se puede poner en cuestión es la propia viabilidad de esta última.

9. Los pronunciamientos judiciales que afectan al grupo

9.1. La extensión de la responsabilidad a la sociedad dominante

La Guía Legislativa aborda bajo el título “Recurso a la vía judicial” una serie de cuestiones de gran importancia desde el punto de vista material (119). Podría decirse que el nexo común de los distintos epígrafes es el de la eventual determinación de la responsabilidad patrimonial del grupo en el marco del concurso de alguno de sus integrantes.

Volvemos de esta forma a la determinación de lo que son los criterios fundamentales que en esta materia pueden adoptar las legislaciones de los distintos Estados. Desde la perspectiva del ordenamiento concursal español, el principio de la personalidad jurídica impide plantear con carácter general que los demás miembros del grupo tengan que responder de las deudas de una sociedad vinculada en concurso frente a sus acreedores. Sólo de manera excepcional nos encontramos con la posibilidad de exigir esa responsabilidad a la sociedad dominante o titular del control por la vía de su catalogación como administrador de hecho y siempre y cuando el concurso sea calificado como culpable, tal y como antes referimos (120). En ese caso, puede llegarse a una sentencia por la que el Tribunal determine que a esa sociedad dominante se le debe atribuir la condición de administrador de hecho, con los pronunciamientos que corresponden en materia de pérdida de derechos, de reintegración de bienes o derechos a la masa activa, de indemnización de los daños y perjuicios causados o, incluso, de pago a los acreedores concursales (v. art. 172.2, 3º y 3 LC).

Tan severa responsabilidad requiere, como se ha señalado, la calificación culpable del concurso. Aunque el art. 164.2 LC establece tal calificación, en todo caso y ante determinados supuestos, cabe entender que a esa misma calificación se puede llegar a partir de cualquier otra causa apreciada por el Tribunal que, en relación con el funcionamiento del grupo, permitan afirmar que contribuyeron a la “generación o agravación del estado de insolvencia”. A tal efecto, algunas de las situaciones que enuncia la Guía Legislativa son aplicables en el marco del ordenamiento español: el uso indebido o abuso del control con explotación de la sociedad dependiente; la conducta fraudulenta del accionista dominante; el desvío de elementos del activo o incremento del pasivo; la utilización de sociedades del grupo como mero fiduciario; la gestión de negocios que redunda en perjuicio de ciertas categorías de acreedores; la fragmentación artificial de

(119) V. Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartados 92 y ss., pp. 49 y ss.

(120) V. supra 5

una sociedad o comunicación patrimonial de dos o más sociedades vinculadas; la descapitalización; el falseamiento de la imagen del grupo, etc. (121).

Sin perjuicio de lo dicho, no debemos olvidar que en el seno del concurso los administradores concursales de una sociedad perteneciente a un grupo pueden ejercitar las acciones de responsabilidad que, haciendo uso de nuestro derecho de sociedades, pudieran proceder contra la matriz. Ciertamente es que nuestro ordenamiento societario no proporciona un régimen específico –ni siquiera, una disposición normativa aislada– sobre la responsabilidad en el seno de los grupos de sociedades; sin embargo, nuestra doctrina sí ha elaborado una construcción dogmática –de lege lata, a partir de los instrumentos positivos con que actualmente contamos (figura del administrador de hecho, deber de fidelidad del socio dominante y régimen de responsabilidad de los administradores sociales)– que permite a la sociedad filial dañada exigir –ante la concurrencia de determinados presupuestos– a la sociedad matriz la responsabilidad derivada del ejercicio dañino por parte de ésta de su poder de dirección unitaria (122).

9.2. Las exigencias de aportaciones financieras a las demás integrantes del grupo

La posibilidad de que un Tribunal ordene a una sociedad solvente del grupo (presumiblemente, la dominante o matriz) que realice una aportación financiera a favor de una sociedad insolvente del grupo no tiene cabida en estos momentos en el régimen concursal español. No se permite al Juez del concurso adoptar decisiones que suponen intervenir sobre la gestión y el patrimonio de una sociedad solvente y completamente ajena al concurso de la otra sociedad. No está de más tomar en consideración las referencias que se hacen a la regulación adoptada por algunos países y a los intereses en conflicto que esta medida –sin duda excepcional–, implica desde la perspectiva española.

La doctrina europea especializada viene desde hace tiempo cuestionándose la posibilidad de exigir a la sociedad matriz una “responsabilidad por la correcta financiación del grupo”, esto es, viene planteándose si como sociedad matriz (en su condición de titular de la dirección unitaria y, además, socio de control –directo o indirecto, como ocurre en la mayor parte de los casos– de las sociedades filiales)

(121) Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartado, 97, pp. 50 y 51.

(122) Una construcción y análisis completo de las posibilidades que ofrecen estos instrumentos puede verse en Fuentes Naharro, *Grupos de sociedades y protección de acreedores*, cit., p. 231 y ss.; de forma sintética en “Grupos de sociedades” (voz), en *Diccionario de Derecho de Sociedades* (coord.) Alonso Ledesma, Madrid, 2006. Resulta imprescindible no obstante la consulta de los importantes y precedentes trabajos doctrinales que, sin ánimo de exhaustividad, a continuación se citan: Embid Irujo, J.M. *Grupos de sociedades y accionistas minoritarios: la tutela de la minoría en situaciones de dependencia societaria y grupo*, Ministerio de Justicia, Madrid, 1987; “La problemática de los grupos”, en *Derecho de Sociedades de Responsabilidad Limitada*, (coords.) Rodríguez Artigas et al., II, Madrid, 1996, p. 1223 y ss; *Introducción al derecho de los grupos de sociedades*, cit.; Girgado Perandones, P., *La responsabilidad de la sociedad matriz y de los administradores en una empresa de grupo*, Madrid, 2002; De Arriba Fernández, M.L., *Derecho de grupos de sociedades*, Madrid, 2004.

puede ser responsable por la inadecuada capitalización (infracapitalización material) de cualquiera de las sociedades filiales en que participa (123).

Como señala la doctrina alemana -que se ha ocupado muy especialmente de este problema- al igual que ocurre en el ordenamiento español, su legislador no exige que una sociedad deba ser constituida con un capital proporcionado o adecuado a la actividad comercial que va a desarrollar; sin embargo, cada vez más a menudo nos encontramos en la práctica con sociedades de capital en las que no existe una relación de proporcionalidad entre la actividad empresarial desarrollada y su capital propio. La pregunta que surge entonces es: ¿tendrían en tales casos que responder los socios -ya sean personas físicas o jurídicas- si la sociedad, debido a esta insuficiente capitalización, se manifiesta incapaz de cumplir sus obligaciones frente a sus acreedores? La mayor parte de los autores de este país responden de forma positiva a esta pregunta, y faltando como decimos norma positiva expresa que sancione tal conducta, abogan por un “levantamiento del velo” en los supuestos de infracapitalización, extendiendo la responsabilidad por las deudas de la sociedad a los patrimonios personales de los socios que no la dotaron con un capital adecuado (124).

Se trata por tanto de una solución jurídica que no hace sino eliminar el privilegio de la responsabilidad limitada de aquellos accionistas que no han dotado a su sociedad de forma adecuada; así, la naturaleza misma de la medida hace que ésta sólo sea predicable de las relaciones entre relaciones de socio-sociedad, relación que, en ocasiones, podrá no existir entre la sociedad filial infracapitalizada y la matriz (125). Aún así -esto es, a pesar de que en ocasiones esta doctrina no será predicable en el seno de algunos grupos- el estudio de la

(123) Como es sabido, el estudio de la correcta financiación de las sociedades siempre ha sido observado desde una doble perspectiva de análisis, distinguiéndose así entre infracapitalización nominal y material. Por todos es sabido en qué consisten una y otra. La primera se da cuando la empresa social se encuentra dotada de los medios necesarios para realizar su actividad pero éstos se le han suministrado, no mediante la aportación de fondos propios, sino mediante la concesión directa o indirecta de préstamos por parte de los socios. La segunda forma de infracapitalización se produce siempre que las necesidades financieras de una sociedad (que tiene un capital social del todo desproporcionado en relación a su objeto social) no se cubren ni siquiera con préstamos de los socios: por todos, v. Portale, “Grupos y capital social”, cit., p. 8438.

(124) Su razonamiento se basa en que la función jurídica central del capital social de una sociedad es parecida a la de un “colchón de riesgo” (*Risikopolster*). Se trata de un instrumento cuya ratio legis es proteger la existencia de la sociedad, manteniéndola con una solidez financiera; y para que este fin legal sea cumplido, el capital social debe corresponderse en principio, como mínimo, con los riesgos económicos que asume la sociedad en el tráfico mercantil: Lutter, M., “Die zivilrechtliche Haftung in der Unternehmensgruppe”, ZGR, 1982, p. 249. Consideran que un capital totalmente insuficiente, si bien no impide el nacimiento de la persona jurídica, no puede conducir a la aplicación del privilegio de la limitación de la responsabilidad: “los socios de una construcción defectuosa responden personalmente por la incapacidad de pago que los acreedores de tal sociedad deben sufrir en el concurso” (dogmáticamente, como apunta Lutter, ibídem, p. 249, nota 16, se llega a esta conclusión a través de una reducción teleológica del fin de la norma, en este caso, de los §§13.2 GmbHG y 7 AktG).

(125) En este sentido, la doctrina española y la jurisprudencia son unánimes al vincular siempre esta responsabilidad a la condición de socio. Por todos, V. Paz-Ares, C. “Sobre la infracapitalización de las sociedades”, ADC, 1983, p. 1587 y ss. (en especial, sobre la infracapitalización material, p. 1595 y ss), y “La infracapitalización. Una aproximación contractual”, RdS, núm. extraord., *La reforma del derecho de sociedades de responsabilidad limitada*, 1994, p. 253 y ss. (en especial, p. 256 y ss.).

infracapitalización material ha alcanzado cierta relevancia en el contexto de los grupos de sociedades y algunos autores estudiosos de la doctrina del levantamiento del velo han estudiado específicamente la relación entre infracapitalización material y responsabilidad del grupo (126).

9.3. La consolidación patrimonial

El pronunciamiento jurisdiccional que puede adquirir una mayor relevancia en el futuro tratamiento de la insolvencia de los grupos es el que se refiere a la denominada consolidación patrimonial (también conocida como “consolidación sustancial”, término que resulta de la traducción literal de la expresión substantive consolidation, proveniente del derecho estadounidense donde esta institución tiene su origen). Se trata de una directa negación de lo que hemos repetido que constituye el criterio fundamental en el tratamiento de la insolvencia de los grupos y que no es otro que el respeto de la limitación de responsabilidad patrimonial que resulta de la personalidad jurídica propia e independiente que se atribuye a cada una de las sociedades vinculadas.

Como señala en su introducción sobre este punto la Guía Legislativa (127), la consolidación patrimonial implica la ignorancia de la personalidad jurídica y la consolidación o confusión de los activos y pasivos de las distintas sociedades vinculadas insolventes que se tratan como si pertenecieran a un único titular y patrimonio. El fundamento inspirador de la consolidación patrimonial es el elemental de cualquier disposición concursal: el favorecimiento de los intereses de los acreedores.

Es precisamente esa trascendencia patrimonial de la consolidación la que ha hecho que sea una práctica que se produce en escasos ordenamientos y a partir de una creación judicial. Las resoluciones u órdenes de consolidación patrimonial se han sometido en esos Estados a criterios restrictivos que hacen que se adopte en situaciones extremas cuando resulta muy difícil o prácticamente imposible delimitar la masa activa y pasiva de cada una de las empresas que se encuentran en concurso. La falta de una separación real de los patrimonios correspondientes a cada sociedad o el hecho de que la estructura del grupo se corresponda a una intención claramente fraudulenta, sirven de justificación para adoptar esa consolidación. Es elogiable el intento que lleva a cabo la Guía Legislativa para sistematizar las circunstancias que fundamentan la consolidación patrimonial. Ésta sería en el concurso la consecuencia lógica de una previa integración de las sociedades vinculadas que termina obligando a ese tratamiento consolidado

(126) Scheel, *Konzerninsolvenzrecht (Eine rechtsvergleichende Darstellung des US-amerikanischen und des deutschen Rechts)*, Köln, 1995 p. 382.

(127) Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartado 105, p. 53.

de su patrimonio ante la insolvencia (128). Como en tantas otras de las medidas incluidas en la Guía Legislativa con relación a la insolvencia de los grupos, la consolidación patrimonial implica la ponderación de intereses contrapuestos. El caso más evidente es el de los distintos acreedores de cada una de las sociedades cuyos patrimonios se pretenden consolidar. La consolidación beneficia a aquellos acreedores cuya posibilidad de cobro estaba cuestionada por un patrimonio insuficiente de la sociedad deudora, pero amenaza ese mismo derecho de cobro de los acreedores de las sociedades que contaban con un patrimonio mayor. Aparece la continuidad del grupo y la finalidad de reorganización del mismo como una justificación admisible para la consolidación patrimonial.

Pero además, nos encontramos con una afectación directa de las clasificaciones de los distintos créditos, puesto que quienes podían ocupar un rango preferente en el concurso aislado de una de esas sociedades, en el marco de la consolidación pueden ver que su crédito es objeto de una especial postergación, al tomarse en cuenta también los créditos contra otras sociedades.

La propia Guía reconoce como uno de los principales problemas de una consolidación patrimonial el tratamiento de los denominados acreedores garantizados. Quien disponga, por ejemplo, de una garantía real sobre el bien de una sociedad se preguntará, en caso de consolidación, si ésta permanece circunscrita a ese mismo bien o se entiende ampliada al patrimonio consolidado. Parece que la solución más sencilla sería la primera o incluso se apunta de dejar a lo que se llaman acreedores garantizados externos al margen de la consolidación.

La consolidación plantea múltiples cuestiones desde el punto de vista procesal que la Guía Legislativa aborda, como también lo hacen las recomendaciones 219 y siguientes. Pero quizás los efectos más relevantes sean los de carácter estrictamente patrimonial. El más notorio es el que a partir de la resolución que acuerde esa consolidación patrimonial, existirá una única masa activa o pasiva en el concurso, contra la que se dirigirán todos los créditos de los acreedores (a salvo la excepción referida a los acreedores amparados por una garantía real). La consolidación implica una unidad patrimonial que, aun cuando no permita

(128) Nota de la Secretaría, (A/CN.9/WG.V/WP. 92), cit., apartado 112, p. 56: "... Corresponde en cada caso ponderarlos entre sí, dado que ninguno de ellos es necesariamente decisivo ni es preciso que se den todos ellos en un determinado caso. Cabe citar los siguientes: la existencia de estados financieros consolidados del grupo; la utilización de una única cuenta bancaria para todas las empresas del grupo; la comunidad de intereses y la mancomunación de bienes entre las empresas del grupo; la dificultad que suponga deslindar el activo y el pasivo de cada empresa; la magnitud de los gastos generales, contables, de gestión o afines que compartan las distintas empresas del grupo; la existencia de préstamos internos y de garantías recíprocas entre las empresas del grupo; el hecho de que se hayan traspasado bienes o de que los fondos hayan circulado de una empresa a otra por razones de conveniencia sin cumplir los requisitos formales del caso; el grado de suficiencia del capital; la mezcla de bienes o de operaciones comerciales; el nombramiento de personal directivo o de gestión compartido y la celebración de reuniones combinadas de sus juntas directivas; la utilización de una sede en común; tratos fraudulentos con acreedores; la práctica de inducir a los acreedores a negociar con el grupo como entidad única, creando así confusión entre los acreedores al no saber con cuál de las empresas estaban tratando, o de difuminar los límites jurídicos de las empresas del grupo; o las ventajas que la consolidación suponga para la reorganización del grupo o para los acreedores".

considerar que afecta a un único titular, sí permite afirmar que se produce una confusión sobre ese mismo patrimonio de los créditos y deudas. Esto afecta a las deudas y garantías intragrupo, lo que conduce a un pronunciamiento del que se van a ver especialmente favorecidos los acreedores externos al grupo. Se trata, por un lado, de la cancelación de los créditos y deudas entre las empresas del grupo afectadas por la misma y, por otro, de extender esa cancelación a las garantías constituidas a favor de las sociedades del grupo.

Como veíamos, las disposiciones de declaración conjunta o de acumulación de concursos previstas en nuestra Ley Concursal antes referidas (arts. 3.5 y 25.1) o las de “coordinación procesal” recogidas en la Guía Legislativa, únicamente pretenden llevar los procedimientos abiertos contra dos o más deudores como parte de un único proceso, sin por ello afectar los derechos sustanciales y las responsabilidades de los acreedores o de los deudores, de forma tal que los efectos o resultados de la operación son estrictamente procedimentales. Sin embargo, la “consolidación patrimonial” (substantive consolidation en Estados Unidos o “apertura de procedimiento único” en Francia), no sólo representa un instrumento procesal que mejora la gestión de los patrimonios de diversas personas jurídicas sometidas a concurso, sino también la reunión de las masas activas y pasivas de las sociedades deudoras en cuestión, eliminando todos los créditos y garantías que ambas se hubiesen concedido recíprocamente (129).

Se trata en definitiva de una institución dirigida a consolidar el activo y el pasivo de la matriz y la filial –o incluso de varias filiales-, obligando a los acreedores de todas a dirigirse a un solo patrimonio común para satisfacer sus créditos, con lo que, desafortunadamente, de forma casi inevitable, algunos acreedores de alguna de las sociedades se ven perjudicados (130).

De esta forma, este tipo de consolidación, por sus efectos sustantivos, se ha traducido en la práctica en una suerte de “variante” de la aplicación de la doctrina del levantamiento del velo en el seno de los grupos de sociedades. Y es que, aunque los presupuestos que se barajan con objeto de su aplicación son muy heterogéneos, casi todos ellos evocan criterios similares a los que vienen aplicándose en las

(129) Blumberg, “The law of corporate groups in the United States”, en *I gruppi di società (Atti del Convegno Internazionale di Studi, Venezia, 16-17-18 novembre 1995)*, Riv. Soc., I, Milano, 1996, pp. 451 y 452, nota 103, donde señala el autor que también en Nueva Zelanda se ha autorizado una consolidación semejante de los patrimonios de las sociedades de grupo en los procedimientos de liquidación (winding-up).

(130) Blumberg, *The law of corporate groups. Procedural problems in the bankruptcy or reorganization of parent and subsidiary corporations, including the law on corporate guaranties*, Boston-Toronto, 1983, p. 402, y jurisprudencia citada por él, en especial, el caso “Continental Vending Machine Corp.”, 517 F. 2d 997, 2d Cir. (1975).

decisiones judiciales que procedían a levantar el velo societario (131) (nos referimos a la unidad o integración económica de los miembros del grupo, a la imagen externa de unidad o la confusión de patrimonios).

Cabe señalar no obstante que la aplicación de esta doctrina se ha ido apartando de sus presupuestos iniciales y se ha ido “objetivando” en su aplicación al grupo de sociedades, lo que se ha traducido tanto en EEUU como en Francia en su aplicación “automática” en el seno de los grupos por parte de los jueces ante la mera constatación de su existencia, sin atender a elementos adicionales como el fraude o el abuso de derecho, procediendo así a desconocer, en definitiva, la distinta personalidad jurídica de las sociedades que lo forman, e imponiéndose el tratamiento del fenómeno como si de un único sujeto de derecho se tratase (132).

Aún han llegado más allá los tribunales de estos países en otras ocasiones –no muy numerosas– en las que esta objetivización de la aplicación de la doctrina de la consolidación sustancial ha ido acompañada, además, de la apertura del procedimiento concursal respecto de sociedades del mismo grupo que se encuentran in bonis, es decir, se ha producido una evolución de la doctrina de la consolidación hacia la de la “extensión de la quiebra o del concurso” a que antes nos referíamos (133). En consecuencia, los efectos de la aplicación, en estos casos, de la doctrina de la consolidación son mucho más severos que los que conlleva la doctrina del levantamiento del velo, en tanto no sólo se extiende la responsabilidad por deudas a las sociedades del grupo cuyas masas se atraen –se consolidan– al procedimiento de la concursada, sino que se las sanciona gravemente sometiendo a un procedimiento concursal a sociedades –generalmente

(131) En los Estados Unidos, son cuatro las sentencias que han marcado el desarrollo de la institución de la consolidación sustancial, y todas ellas fueron adoptadas entre los años 1964 y 1975 por el mismo Tribunal Federal de Apelaciones, el del Segundo Circuito. Los fundamentos jurídicos de estas decisiones son en algunos casos muy complejos (por lo que la utilidad de esta institución haya sido en ocasiones puesta en tela de juicio) aunque, como decíamos, invocan presupuestos similares a los que concurrían en los casos de levantamiento del velo. Las referidas sentencias son las dictadas sobre el caso “Soviero v. Franklin National Bank” (“Soviero v. Franklin National Bank” (328, F. 2d 446, 2d Cir. 1964), el caso “Chemical Bank N.Y. Trust Co. v. Kheel” (“Chemical Bank N.Y. Trust Co. v. Kheel” (369 F. 2d 845, 2d Cir. 1966), el “Flora Mir Candy Corp.” (432 F. 2d 1060 (2d. Cir. 1970), y en 1975 el caso “Continental Vending Maching Corp.” (“Continental Vending Maching Corp.” (517 F. 2d 997, 2d Cir. 1975). Puede verse una exposición detallada de los argumentos invocados por los tribunales en Blumberg, *The law of corporate groups. Procedural problems in the bankruptcy...*, cit., pp. 410 a 415.

(132) Sobre esta evolución y la influencia que en ella han tenido los principios de la *enterprise law doctrine* estadounidense véase Fuentes Naharro, *Grupos de sociedades y protección de acreedores*, cit., p. 478 y ss.

(133) V. *supra* 4.1.

matrices- solventes por el hecho de pertenecer al grupo de la concursada (134). Esta solución jurisprudencial no hace más que añadir riesgos considerables al tráfico mercantil, toda vez que la insolvencia de una pequeña filial podrá suponer la atracción al procedimiento concursal de una sociedad matriz de importantes dimensiones que era perfectamente solvente (135). Y es que, aunque el pasivo de la filial pudiese ser asumido rápidamente por la sociedad madre inmersa en el procedimiento, el daño y las perturbaciones que la apertura del mismo ha podido causar para ésta, probablemente sean insubsanables.

10. Recapitulación

La introducción en la Guía Legislativa de la CNUDMI de una nueva parte dedicada a la insolvencia de los grupos debe ser bienvenida. Supone un marco común útil para afrontar los problemas propios de un tipo de insolvencia especialmente complejo, como es el que afecta de forma total o parcial a empresas policorporativas. La Guía supone además la superación de los límites que ofrecen las legislaciones estatales, que no han contemplado la tramitación de concursos que afecten a más de un deudor.

Desde la perspectiva española, las medidas y recomendaciones de naturaleza procesal ya son conocidas. No sucede lo mismo con aquellas otras medidas que implican el tratamiento unitario del grupo, cuyo acogimiento se ve obstaculizado por la vigencia de la personalidad jurídica independiente de las sociedades vinculadas y la consiguiente separación de sus patrimonios.

(134) Como prueba de esta preocupante tendencia en la jurisprudencia estadounidense se suelen mencionar los casos “1438 Meridian Place, N.W. Inc” y “Crabtree” (V. Sargent, “Bankruptcy remote finance subsidiaries: the substantive consolidation issue”, *Business Lawyer*, 1989, p. 1234). No obstante, justo es decir que la doctrina y jurisprudencia mayoritaria han rechazado esta tendencia y coinciden en la necesaria concurrencia del presupuesto de la insolvencia. En ese sentido, por ejemplo, se manifiestan las sentencias sobre el caso “Alpha & Omega Realty Corp”, que sostenía expresamente que la regla contemplaba única y exclusivamente la consolidación de dos procedimientos de quiebra ya abiertos, y la sentencia sobre el caso “DRW Property Co. 82”, en la que el tribunal afirmaba que “ni el common law ni ninguna ley reconoce la consolidación sustantiva de un quebrado con un socio que no lo esté, ya que estos últimos excluidos por completo del ámbito de jurisdicción de este tribunal”(36 Bankr. 416, 417, Bankr. Idaho 1984, y 54 Bankr. 467, respectivamente). También puede consultarse, “Goldman v. Haverstraw Assocs. (In re R. H. N. Realty Corp.)”, 84 Bankr. 356 (Bankr. SDNY 1988), todas ellas comentadas por Sargent, *ibídem*, p. 1235, nota 72).

Desafortunadamente, esta tendencia es más numerosa en la jurisprudencia francesa, y cuenta con más apoyos por parte de su doctrina. Así, encontramos dos significativas sentencias, una de la Sala de lo Comercial de la Corte de Casación, de 26 de marzo de 1985 (En D., 1985, somm. 491, comentada por Honorat), y otra de la Corte de Apelaciones de París, 15 de abril de 1988 (En D., 1988, somm. 385, comentada por Derrida), que afirman que la confusión de patrimonios implica, necesariamente, la extensión del procedimiento concursal a todas las sociedades implicadas en tal confusión, sin necesidad de constatar que todas ellas estén en cesación de pagos. Esta posición jurisprudencial ha levantado numerosas críticas, por cuanto, obviamente, carece de sentido someter a un redressement judiciaire o a un proceso de liquidación concursal a una empresa que puede hacer frente al pago del pasivo que, en virtud de la sanción por confusión de patrimonios, se le exige.

(135) En sentido crítico con respecto a la admisión de esta solución en la reforma alemana, v. Hopt, K./Steffek, F., “La reforma del Derecho de la insolvencia. La perspectiva alemana y europea”, *ADCo* 21, 2010, p. 577 y ss.

Groups and groups' bankruptcy discipline in Italy (136)

Magda Bianco – Monica Marcucci

1. The objectives of a good bankruptcy law and the recent Italian reform. – 2. Groups in Italy. – 2.1. Relevance. – 2.2. Functions. – 2.3. The role of internal capital markets. – 3. Groups' discipline. – 4. Groups in the current insolvency legal framework. – 5. The law on Special Administration of large enterprises. – 6. The special regime for banking groups under legislative decree n. 385/1993. – 7. The Italian Insolvency Law: its gaps and potentialities. – 8. Which provisions for group crises? – 8.1. Past attempts to regulate group insolvency. – 8.2 Ex post coordination; treatment of intra-group transaction. – 8.3. Regulatory safeguards to prevent abuses: liability, subordination, avoidable transactions.

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1. The objectives of a good bankruptcy law and the recent Italian reform

The efficiency of a productive system is a function of its ability in ensuring an effective resource allocation (and re-allocation) towards the most productive uses. This capacity is particularly relevant in a phase of recession.

An effective bankruptcy law contributes to this aim through both favouring the restructuring of companies which are still productive, and ensuring an efficient liquidation of those with no economic perspectives. Timeliness, speed, ability to select companies with economic value, limited total costs are essential towards this objective. All these features can induce an effective resource allocation *ex ante* by reducing the cost of credit for active firms, and provide better insurance for firms against the possibility of failure.

The Italian pre-reform bankruptcy law was extremely inefficient under all respects: neither could it avoid *ex post* misallocations and inefficient liquidations (due to the lack of both adequate incentives for debtors and effective reorganization mechanisms), nor was it effective *ex ante* (due to excessively tough sanctions and an excessive length of the procedures). Empirical evidence clearly shows the bad performance of the previous bankruptcy system, in terms of creditors' recovery rates and length of the proceedings. As Figure 1 clearly shows, the performance of the law had rapidly worsened, at least from the mid 80s. All this caused severe destructions of value, distortions in the economic actions and lower propensity to entrepreneurial risk. In 2005, the Doing Business report of the World Bank was ranking Italy at the 40th place with reference to the "closing a business" indicator, whereas, among the continental European countries, France and Germany were much better positioned.

In 2005-06 a major reform substantially updated the Italian bankruptcy legislation. The Insolvency Reform act (enacted with the Law Decree 35/2005 and then with the Legislative Decree 5/2006), the provisions of which came into force on 16 July 2006, brought the most significant changes to insolvency law for over 60 years.

The reform sets up noteworthy innovations, designed to better achieve the objective of *ex post* efficiency; it seeks, in particular, to facilitate company rescue in case of temporary difficulties and reduce sanctions on the bankrupt debtor. The major departures concern the fundamentals of bankruptcy rules: the objective and subjective requirements for entering procedures; the various options available for rescue; the mechanisms for liquidating the business; the powers given to the appointed bodies; the effects of the proceedings on the assets and parties involved; the mechanisms for judicial review.

The new law establishes three different schemes for business failures resolution: a) rescue through out of court agreements (restructuring agreements; certified plans); b) judicial reorganization based on a restructuring plan confirmed by creditors (*concordato preventivo*); c) winding up (*fallimento*, which may end up with an agreement with creditors, the so called *concordato fallimentare*). Some adjustments were later introduced mainly with reference to the size threshold to

access the procedures (Legislative Decree 169/2007). The winding up has been modernized, with a view at granting a certain leeway to both the administrator and the creditors in the identification of the most appropriate and effective liquidation options (even in the worst scenario maximization of “gone concern” values should be sought to the extent possible); the discipline of “concordato preventivo” has been fully reshaped in order to make it easier to reach an agreement (cram down), whose content is essentially left to contract freedom of the relevant parties; new tools have been introduced to encourage the conclusion of out-of-court voluntary agreements with creditors (restructuring agreements and certified rescue plans); the regime of voidable transactions has been rationalized, by reducing the so called suspect period and exempting certain types of transactions.

As a whole, the reform has substantially improved the disciplinary framework. It should provide better incentives for the debtor for an early revelation of the difficulties and should make restructuring more likely. It is interesting to notice that in 2010 the Italian position had strongly improved in the Doing Business ranking with reference to the “closing a business” indicator: 29th (with Germany 35th and France 42nd).

However the channels through which a higher efficiency affects the economy are not explored yet. Are procedures becoming faster? Is the reform inducing a greater use of restructuring procedure (which in the past were almost never entered)? Is this affecting investment decisions (due to the lower riskiness)? What are the effects in term of the cost of credit: an increase – if the reform is perceived to be softer towards creditors? Or a reduction if the sum of all the effects ensures higher recovery rates for financiers? As a whole is the new bankruptcy legislation more conducive to an efficient allocation (and re-allocation) of resources? As noted these effects might be expected to be particularly relevant when the economy is going through a deep recession. They might be even more relevant in the Italian framework: in the years immediately before the crisis some signals of a restructuring process taking place at least among some firms were emerging. Mechanisms favouring a correct “selection” of virtuous firms (those with long term perspectives, even if experiencing financial stress in the current downturn) are essential in this context.

Some preliminary evaluations are provided in Bianco, Rodano, Romano (2010) and Rodano (2010). First, while in 2004 only 1.9% of the firms in crisis (either bankruptcy or restructuring) resorted to a restructuring, in 2009 this share was up to 10.4%. The increase is particularly strong starting from 2006, when the reform is likely to have started to have effects on the procedures. This suggests that in a first instance the instrument was appreciated by the market.

However – according to some analysts – this might also be an evidence of an opportunistic use of it, by companies who should go bankrupt and instead induce creditors to accept unfair conditions. Therefore in order to have a more complete picture of how the new procedure works, the authors look at the survival of companies as an indicator of the performance of the restructuring procedures. They consider the share of companies still on the market some time after they

closed a restructuring procedure. The percentage of companies still on the market 2 years after was 80,5% before the reform (when only a limited number of companies used the procedure, which had a very restrictive access, imposing high recovery rates for creditors); and is still 79,7% after the reform, suggesting that the widening of the access has not worsened the opportunities for recovery.

One of the goals of the reform was to induce an earlier emergence of the firm difficulties in order to improve the chances of success in the restructuring. They consider an indicator of the riskiness of the company (137), to check whether less risky firms enter a procedure. The firms that entered a restructuring agreement before the reform (2003-2005) had an average rating of 6.93, while it was slightly better (6.91) for the firms that entered a restructuring agreement after the reform (2006-2008). Similar conclusions arise from the comparison of the distribution of the score of those firms which entered a restructuring procedure before and after the reform: among all firms that entered in a restructuring agreement before the reform, the share of the riskiest firms was 74,9 and decreased to 72,6 after the crisis. This suggests that actually firms enter the restructuring process earlier. The same is not true for those who enter a bankruptcy proceeding: the share of risky firms increased from 71.6 before the reform to 72.6 after.

Another goal of the reform was to simplify the procedures in order to improve the working of the bankruptcy law in Italy. Three different proxies of the length of a procedure have been considered: i) the time span between the opening and closing date of the procedure (either bankruptcy or restructuring) when the latter is available; ii) when the closing date is not available, the time span between the opening date and the opening of another procedure (e.g. a bankruptcy after a restructuring agreement or a liquidation after a bankruptcy); iii) the share of procedures closed within a given time span, among all opened procedures. While it is possible to get clear results for the restructuring procedure, which are shorter on average, it is more difficult to get an idea about bankruptcies, which are much lengthier. On average the length of restructurings has reduced. Restructurings closed in 2000 take a shorter time (12,5 months on average) than those closed in 2009 (6,5 months). The length of a bankruptcy procedure has instead increased: from 71 months for a bankruptcy closed in 2000 to 81 for a bankruptcy closed in 2008.

Finally, a clearer discipline and better restructuring possibilities might favour investment decisions and also improve credit conditions. In order to test for the first, investment decisions of companies which are subject to the reform are compared to those of a control group which does not bear the effects (138).

(137) A “score” produced on the basis of balance sheet data which takes values between 1 and 10, increasing in riskiness.

(138) To do this the change in thresholds for eligibility as defined by the decree 169/2007 (which came into effect at the beginning of 2008) has been used (See Rodano, 2010). As a control group he considers those firms that were too small to be eligible even before the change in the eligibility thresholds. As the treatment group they consider those firms which were not eligible before the new law but became so after the law was passed. The effect of the reform on investment can be gauged by comparing the difference between treatment and control group of the change in gross investment before and after the reform (difference in differences).

Under the assumption that, absent the reform, the firm would have showed similar behaviour, any difference between the two groups, which differ mainly in the exposition to the reform, is capturing the effects of the reform. After the reform gross investment grew for both groups of firms. However, gross investment of firms subject to the reform grew much more than for other firms. A clearer picture emerges from a regression analysis of the same phenomenon, allowing to control for the effect of other variables that might affect investment decisions (revenues, labour costs, debts, liquidity, debts, value added, the score for riskiness, age of the firm). The results show that both groups invested more in 2008 than in 2007, but in those years where the two groups started to be different (because of the change in the eligibility thresholds) they started behaving differently from before.

2. Groups in Italy

Here we define a group as a set of companies – i.e., of separate legal entities – which are under the control of the same agent, through ownership links. Business groups are a common corporate organizational form in several continental European and developing countries. Frequently, they have a pyramidal structure with a holding company at the top and various layers of subsidiaries below. The entrepreneur typically has the majority of voting rights in every company, either directly in the holding or indirectly in the subsidiaries. In Italy groups are mainly pyramidal, but in a number of cases may also be horizontal.

2.1. Relevance

According to Istat, in 2008 there were 76.000 groups of firms in Italy, with more than 178.000 Italian companies and more than 5,7 million employees. 21% of limited liability companies were part of a group (55.3% of employment), with a greater frequency in the North West (25.9%) and North East (25.1%) and a lower one in the Center (19.1%) and in the South (12.7%). Groups are 2% more than in 2007, with employment 0.8% larger.

They are more common among larger companies (fig. 2); a relatively large number has a quite complex structure: in 2007, 59 groups included more than 50 companies (on average 87 each); almost 860 included between 10 and 49 companies. The vast majority of listed companies belong to a pyramidal group, where often another company is listed as well, but also a large number of smaller companies are organized as pyramidal groups (and are possibly more similar to divisions of larger companies than independent companies).

2.2. Functions

There are a number of organizational reasons that might justify a group structure from an efficiency perspective. First, the legal separation between single companies allows to exploit the limited liability of each, reducing the risk of bankruptcy for the entire group.

Secondly, in “listed groups”, i.e., groups including at least one listed company, a pyramidal structure is a control enhancing mechanism, which allows to control a large set of resources through a limited financial involvement of the controlling agent. By spreading the voting rights of minority shareholders over a large number of firms and concentrating those of the entrepreneur at the top of the pyramid, a pyramidal group structure allows the latter to control the largest possible amount of assets with the smallest inflow of his own capital. This mechanism might create a strong agency problem due to the separation between ownership and control: the controlling agent, at low levels of the pyramid, might be able to keep its control through the control chain, but actually receive a very low fraction of cash flow rights. This may introduce an incentive to favor the companies at the top of the pyramid or those where the controlling agent has more cash flow rights at the expense of other companies.

Thirdly, within a group, almost formal internal capital markets might be created which might allow a more efficient allocation – and reallocation – of financial resources towards the most productive uses.

On the other hand, especially for listed groups or anyway for those with a number of minority shareholders involved, insufficient transparency or inadequate shareholder protection might induce the exploitation of conflicts of interests through related party transactions by the controlling agent, who might transfer resources from companies where he has lower interests to others where his shares are higher.

2.3. The role of internal capital markets

It has been argued that internal capital markets across divisions of companies may allow to reallocate funds efficiently to firms with more investment opportunities possibly at lower costs as compared to external capital markets. However, they might also be an instrument to finance poorly performing divisions (or companies in a group) or allow to expropriate minority shareholders of some companies in the group. In countries where capital markets are not developed, and hence cannot represent a sizable source of funds for firms’ investment activity, and where bank-firm relationships are basically arm’s length, and do not completely substitute for the capital market, internal capital markets might be an efficient substitute to external intermediaries. If this is the case we would expect flows of funds to move to more financially constrained firms and to those with more investment opportunities and as a consequence financial constraints for firms belonging to pyramidal groups to be lower than for independent firms.

On the other side it is possible that internal capital markets mainly perform an “expropriation” role, i.e., especially in countries where minority shareholders’ protection is low and transparency rules and accounting standards are poor, they might allow the controlling shareholder to move funds closer to the head of the group (where his cash flow rights are usually concentrated) or to finance poorly performing companies.

Gertner, Scharfstein and Stein (1994) and Stein (1995) argue that in multidivisional companies internal capital market might allow a better allocation of resources than external capital markets for single companies: headquarters of a multidivisional companies have reduced monitoring problems as compared to external markets. Moreover the residual right of control of headquarters allows them to reallocate resources across units, thus reducing credit constraints for units with better investment opportunities. The existence of an internal capital market might even reduce the total financial constraint of the company, in particular if its activities are sufficiently unrelated. All these considerations may as well be applied to pyramidal groups rather than multidivisional companies. The difference would be that infra-group transfers are not as simple as within a multidivisional company, i.e., they require actual loans or purchases/sales. Moreover in some of the companies of the group there may be minority shareholders of single companies who might be affected by some of these transfers.

For the Italian context a limited number of analyses are available: Bianco, Casavola (1999), Bianco-Nicodano (2006), Finaldi Russo (2009) analyze debt financing and the re-allocation of funds within groups.

Finaldi Russo (2009) shows that internal capital markets are “important”: approximately 20% of total debt of companies belonging to a group are from internal markets. Lenders are typically large companies at the top of the pyramid, using both their cash flow and external funds to finance other group companies. Lenders are typically those enjoying better credit conditions: this allows a lower cost of capital for the entire group.

Some evidence of an efficient role performed by internal capital markets is provided by Bianco and Casavola (1999), who show that companies with larger investment receive a significantly (both statistically and economically) larger amount of flows. In order to discriminate between productive investments and those that might be due to agency problems, infragroup flows are also related to firms past and future growth, which both appear with a positive value. Firms with less internal finance available are, everything else equal, net debtors. In order to check whether the negative sign of cash flow may signal that poorly performing companies receive more funds, positive and negative cash flows are considered separately. It turns out that financial flows are sensitive to positive cash flow and not significantly to negative ones. This might be taken as a sign that flows do not go towards losing companies but only to those with less (but positive) internal funds. Firms which are more financially constrained on the external debt market obtain more funds in the internal capital market, as well as firms paying higher costs of debt on the external market. Hence firms with more investment opportunities, less internal funds and tighter financial constraints on the external financial market receive more funds on the internal capital market. This set of results points to a role for internal capital markets which has substituted for an inefficient or not sufficiently developed external capital market. Further evidence in this direction may be found in the lower excess sensitivity of investment to cash flow for firms belonging to groups.

Finally Bianco and Nicodano (2006) stress in their model that limited liability of the holding company may reduce bankruptcy costs by allowing for partial default of unsuccessful operating units. Protecting some units from the failure of other units is welfare improving, and this improvement is increasing in the size of bankruptcy costs. Their empirical analysis shows that holding companies raise a larger portion of external debt over assets and are net lenders to their subsidiaries. Furthermore, the correlation between company's external debt and the entrepreneur's cash-flow share is positive, when statistically significant. This evidence is inconsistent with other theories of capital structure, which imply either larger debt in operating units or the irrelevance of group capital structure. This pattern mirrors instead one equilibrium of their model, where the entrepreneur commits not to increase risk in subsidiaries by leveraging up the holding company—thus giving up her option of rescuing the holding from the default of operating subsidiaries.

As a whole this evidence suggest an efficiency reason for internal capital markets.

3. Groups' discipline

The Italian legislation recognises the group structure since the 2004 company law reform. Art. 2497 and the following ones of the civil code, without “defining” a group structure, recognize the relevance of the group interest, and hence attribute management and coordination powers to the parent company over subsidiaries, but at the same time provide protection of minority shareholders through a liability regime against expropriation of minority shareholders by the parent company and introduce disclosure mechanisms.

More specifically, firstly, it requires that management and coordination must be exercised in accordance with principles of proper corporate and business management, and in a way that does not impair the profitability of the receiving company, the value of its overall assets, and the value of the shareholding interest. In case of damages arising from the violation of such principles, companies vested with management and coordination powers over other companies will be deemed liable for harmful acts carried out by the controlling companies in their own interest or in the interest of a third party. Liability, however, does not arise if damages are offset by the overall result of coordination on the basis of an after-the-fact inquiry; in other terms, liability only arises if the interest of both the subsidiary and the group as a whole has been disregarded.

Finally, to protect creditors, Article 2497 quinquies was introduced to prevent undercapitalization (a situation very common within groups of companies). This provision establishes that reimbursements of loans made by a holding company to a company subject to management and coordination are postponed in the face of creditors' claims for the reimbursement of their loans. In this way, such loans are tantamount to risk capital. This requirement applies to loans made in any form and granted at a time when there is an excessive imbalance between the company's debts and its net equity, or when the financial condition makes a capital contribution more appropriate.

Contrary to company law, bankruptcy law does not recognize groups (except in the special discipline of extraordinary administration).

This implies that for highly integrated groups (i.e., those where control is realized through strict ownership links; where relevant operational or financial links are present since a large share of purchases or sales are within the group and hence single companies have limited independence) a unique “economic” unit during life becomes a set of single independent units in distress.

This entails that, in case of failure, creditors of each group’s entity will seek to realize their claims towards such entity and there will be separate proceedings with higher costs and possibly disregard of the enterprise value as a whole.

This in turn implies that, on the one hand when the group as a whole is still viable, there might be a higher risk of premature liquidation and it might be more difficult to reorganize the group as a whole (even when value is maximized through global resolution). On the other hand, when rescue is not an option, liquidation by entity may fail first to enable a going concern sale (including all those assets necessary to maximize sale value) and secondly to recognize how assets have been transferred between entities when the group was healthy (with disadvantages for creditors that have claims against the entity that transferred resources to the parent; and making it difficult infra-group financial support within a restructuring process).

The question is then: which discipline should be introduced for taking into account group structure within an insolvency procedure? This should first of all consider: a) the advantages of keeping units legally separated; b) the importance of a unitary “economic” structure; c) but also the risks of conflicts of interest.

Hence in principle it would be necessary:

- to preserve the separate legal entity principle;
- to ensure procedural coordination, to favour restructuring when possible, or anyway reduce bankruptcy costs, taking advantage of the group structure;
- to avoid or at least limit the exploitation of conflicts of interests by keeping into account that riskier activities might be moved into one company (possibly distant from the controlling agent) which is closer to bankruptcy, but also that this might in fact be efficient as long as damaged agents (shareholders and creditors) are somehow compensated.

In what follows we try to detail some of these principles.

4. Groups in the current insolvency legal framework

Italy has been, historically, one of the first jurisdictions to put in place a special regime for the management of group insolvencies. We refer, in particular, to the law on Special Administration of large enterprises (the so called “Prodi law”), which was first enacted in 1979 (law n. 95/1979), then substantially

revised in 1999 (by Legislative Decree n. 270/1999) and again in 2003 (Law Decree n. 343/2003, converted into law n. 39/2004) and 2008 (Law Decree n. 80/2008 converted into law n. 111/2008). Leaving apart any consideration on the performance of this articulated legal framework, its provisions regarding groups are recognized as a rational and advanced model for coordination of separate insolvency proceedings within group enterprises.

Our banking law (legislative decree n. 385/1993), which has a specific section on banks' crises, also encloses a special regime for the management of insolvency within groups, aimed at ensuring a coordinated management of the crisis for all the involved group components, under the direction of the supervision authority.

The general Insolvency law, on the other side, notwithstanding the extensive changes enacted between 2005 and 2006, does not have – as already mentioned - any specific provisions on groups. This is a critical gap, especially in the light of the relevance of the group phenomenon in Italy, as it has been highlighted in previous pages. This lack also shows a serious inconsistency in the regulatory framework, since on the one side it recognizes, pursuant to the recent reform of our company law, group structures and the notion of group interest for the purposes of allowing coordination during the normal business life; on the other side, it ignores the peculiarities of the group organization when death comes close. All this appears difficult to justify also in terms of equal treatment and non-discrimination, having in mind that, as just said, specific provisions for distressed groups do exist, but only for large enterprises.

5. The law on Special Administration of large enterprises

In this respect, it is worth giving some more details on the regulatory regime contained in the law on Special administration of large enterprises. The special administration (SA) was conceived as a procedure specifically aimed at encouraging the restructuring of big and complex firm structures which may generate significant externalities in the absence of other effective tools for the management of business crises. It is both a court- and administrative-directed procedure, only available to large insolvent companies (139). The law describes the objective of the procedure by referring to the protection of the company's assets, goodwill and employees through the continuation, reopening or change of business activities. The notion of business takes into account the various forms under which a large enterprise may be structured, including the form of a group, for which a special crisis management regime is established and a legal definition is given for the purposes of such regime. In particular, the law establishes a special treatment for of entities which are part of a business group, whose notion is based on the concept of control as defined in the

(139) Pursuant to legislative decree 270/1999 (the so called Prodi bis), eligible enterprises must have at least 200 employees; under the Marzano law at least 500 employees are required for an enterprise to have access to the relevant procedure.

Italian civil code (140) and includes in the group perimeter also those companies which are linked by contractual relations with a company entitled to have recourse to the special administration procedure.

On a formal standpoint the insolvency proceedings are separate and distinct for each legal entity of the group and creditors are paid on the basis of the assets and liability ratios of each legal entity. However specific tools are introduced to enhance coordination among these proceedings. Specifically, the special administration regime may be extended to other insolvent companies within the group (even if they do not satisfy the dimension requirements set out by the law), in order to ensure a unitary management of the insolvency proceedings within a group, in so far as this is useful (taking into account the financial or productive relationships between group companies) in pursuing the objectives of the SA. Moreover, procedural mechanisms are designed to ensure administrative cooperation, including the possibility to appoint the same special commissioner for all insolvent companies, or the possibility to reach one single agreement with creditors of all group companies, whose legal independence is however to be preserved (141).

In general, it is acknowledged that this regime (in its variety of versions) has achieved by large good results, at least if compared with the poor performance of the general insolvency law which was in force until 2005 (142). Certain innovative solutions, introduced for instance in the Marzano version of the law, have proven to be so effective that they were adopted in the 2006 Insolvency reform.

The solutions offered by the Special administration procedure suffer however a number of weaknesses.

First of all, this special regime has a limited scope: only very large enterprises may take advantage of its provisions (as a whole approximately 4000 enterprises according to the Prodi law; approximately 1300 according to the Marzano law).

Secondly, its adoption seems affected by a certain degree of legal uncertainty, given the circumstances which in recent years have lead to its several revisions. Each revision took place under the pressure of a specific large company financial distress, with its own peculiarities, and led to different coexistent legal regimes (first the Parmalat crisis, which lead to the Marzano law; then the Alitalia crisis, which induced the enactment of a different version of the Marzano law). Against

(140) For the purposes of the SA, group enterprises are those which: have direct or indirect control over a company subject to a main SA; companies under direct or indirect control of a company subject to SA; enterprises that, by way of their boards composition or other relevant elements are subject to the same joint direction exercised over a company subject to SA.

(141) Such autonomy may allow for example that a different treatment is granted within the same class of creditors, depending on the economic conditions of each single company included in the composition.

(142) Insolvency in Italy has been governed for more than 60 years by the Royal Decree March 16, 1942 No. 267, envisaging a system where the proceeds of the liquidation of the bankrupt entity's assets were the only remedy to the creditors. In this scenario, insolvency was considered as a general offence to the economy while bankruptcy proceedings represented a punishment of the bankrupt. This system had evidently become increasingly inconsistent with the development of the Italian economy and needed a deep change in order to introduce the concept of business rescue, fundamentally unknown before.

this background, reliance on the stability of the legal framework and expectations of investors on the possible outcome of a future crisis are deeply affected. A risk still exists, in fact, that political influence might lead in the future to other changes in the existing rules.

Thirdly, the central role of the administrative authority (even strengthened in the recent reforms), is not balanced by adequate powers to creditors, whose role remains quite limited.

Finally, since currently at least three different versions of the SA procedure exist, depending on the size of the company or group as a whole (the Prodi-bis law, the Marzano law, and the Alitalia law), the legal framework is highly fragmented and patchy. For this reason, a new reform proposal is now pending before the Parliament, aimed at unifying the different procedures into a comprehensive one (d.d.l C. 1741).

6. The special regime for banking groups under legislative decree n. 385/1993

The Italian banking law embodies a special regime dealing with group crises; it is conceived as a coordination mechanism of different proceedings for each group entity rather than as a unique procedure for the whole group.

Specifically, legislative decree n. 385/1993 establishes an early procedure (also named special administration) to be initiated by the supervision authority (Banca d'Italia), and mainly aimed at verifying the possibility to restore adequate capital buffers and sound organization and business conditions. To achieve this objective, the special administrator(s) appointed by Banca d'Italia take over the management of the bank and hold all the powers and prerogatives of the removed administrators, being entitled to take care of the day-by-day management and adopt resolutions which can deeply impact on the structure and organization of the business (143).

The special administration procedure is available not only for individual firms but also for banking groups, where it tries to achieve a balance between a coordinated resolution for the companies of the group and an adequate protection of creditors and shareholders of individual entities. In procedural terms, coordination is pursued by having the banking supervisor as the single authority in charge of the various procedures, irrespective of whether all the involved entities are actually supervised by such authority. In this role, Banca d'Italia is entitled to initiate a special administration procedure of a parent company when one of its subsidiaries has been subjected to a crisis procedure under general bankruptcy law and this could seriously affect the operational equilibrium of the group. Special administrator(s) of the parent company are vested with the power

(143) The shareholders' role is substantially frozen during the procedure. The special administrators decide – under the authorization of the Banca d'Italia when required – on the measures needed to restore the bank soundness.

to remove or replace the subsidiaries' managers and to request the initiation of the special administration procedure for any insolvent subsidiary.

When the parent company is under special administration, the same procedural regime applies to all distressed entities of the group, in lieu of the general bankruptcy rules. The relevant decisions are taken at the level of each legal entity and entail the appointment by the authority, for any single distressed entity, of special administrator(s) or liquidator(s) that might be the same officials designated for the parent company's procedure, as the case may be. Finally, the law allows a single reorganization plan to be implemented for the whole group, without this resulting in the consolidation of the group's assets and liabilities.

As a general remark, the rules and mechanisms offered by the banking law have proved so far effective in the management of significant domestic cases involving groups, as it has been highlighted by Ms. Tarantola in her welcome speech. This is also due to the fact that the relevant provisions are built around a well consolidated notion of banking group, pursuant to which internal coordination is ensured during the ordinary business life. A crucial role in this regard is assigned to the parent company, through which directions from the supervision authority are spread through the group components. The effectiveness of the system is however hindered for those conglomerates that include external entities, i.e. entities which do not fall within the banking group's perimeter and are therefore not subject to the above mentioned rules.

7. The Italian Insolvency Law: its gaps and potentialities

As already mentioned, our general insolvency law has been substantially revised in 2005-2007. However, no specific provisions have been introduced to address insolvency within groups. For each entity, restructuring can be pursued on an individual basis only, without the possibility to conceive joint applications or joint management of different proceedings. This creates a disparity of treatment across firms, since small-medium enterprise groups would benefit from coordination and an integrated approach to failure to the same extent as large groups (144). Furthermore, the irrationality of such discrimination is exacerbated by the fact that under the current legal framework eligibility criteria to have access to the special administration procedure are not selective as they should be in order to justify a deviation from the general rules (145).

However, some innovative tools introduced by the 2005 reform may be profitably used within groups to achieve a coordinated approach in the management of a crisis situation.

(144) See Stanghellini (2007).

(145) It is hard to assume that an enterprise with 200 employees or a group with 500 employees (according to the Marzano law such threshold may be calculated in reference to the group rather than to a single legal entity) may represent, in case of failure, a serious threat for the national economic system.

An example of this is represented by the “debt restructuring agreements”, regulated in article 182-bis of the Insolvency law. Pursuant to this provision, a debtor can agree a restructuring debt agreement with creditors representing at least a 60 percent of his/her total liabilities; non consenting creditors are to be paid in full; the feasibility of the agreement has to be confirmed by an expert appointed by the debtor; once executed, the agreement is filed with the bankruptcy court for validation; further to validation, the acts carried out in pursuance of said agreement are exempted from claw-back proceedings.

Such a scheme, which allows great flexibility within the boundaries set out by the law, seems well-suited to be used within a group context, based on a far reaching interpretation of the relevant rules and their rationale. Such an interpretation has been successfully followed in a recent judicial case, the so called “Risanamento” case (from the name of the parent company), where the court held that restructuring agreements concerning various entities of a group might have been subject to a joint validation order, when functional links exist among the proceedings regarding such entities, and the effects of the agreements are reciprocally subordinated (146). In this case, each agreement submitted to the court for validation was subject to the condition that all agreements submitted by the other group companies be validated.

A similar approach is being adopted also in recent banking group cases, where restructuring agreements are proposed within rescue plans for ailing banking groups.

Another tool offered by the reform which seems capable, at least in principle, to be employed in a group scenario is the so called “certified plan”, as defined in Article 67, lett. d) of the Insolvency law. A “certified plan” is a rescue plan which has been certified by an expert as suitable for the restructuring of the enterprise’s debt and capable of ensuring a financial rescue. The same Article establishes that payments made and security interests granted within the execution of the plan are exempt from claw-back proceedings. Nothing in the law seems to prevent group entities and the holding company from preparing a single certified plan whose scope might extend to the group in its entirety or to certain parts of it (147).

All this shows that the reform might in principle be exploited in order to find appropriate solutions for the failure of groups. This is however unsatisfactory, since the effectiveness of certain tools and their capability to respond to peculiar economic needs of a group is left, in the absence of explicit provisions, to the interpretation of individual judges. The inconsistency of the current framework needs to be definitely solved by establishing appropriate coordination mechanisms

(146) See Tribunale Milano, November, 10, 2009, fallimento Risanamento S.p.A.

(147) It should be considered, however, that if one or more companies go bankrupt later on, the assessment on the attitude of the plan to restructure debt and restore balance-sheet equilibrium would be presumably conducted having regard to each individual component of the group. On this topic see Abete (2009).

in both restructuring and liquidation procedures for companies belonging to a group organization.

8. Which provisions for group crises?

The crucial regulatory issue is therefore what specific provisions and mechanisms are needed to ensure that group insolvencies can be addressed in a more effective way, one which adequately takes into account the economic links among group components.

8.1. Past attempts to regulate group insolvency

The reform of bankruptcy law was preceded by a number of proposals to revise the original law. Two of them included specific proposals for regulating groups' insolvencies.

The first one was the so called Trevisanato Bill (2003), which aimed i.a. at "ensuring coordination of proceedings and pursuing uniform treatment of creditors within a group". Such goal was to be achieved without any pooling of assets' effect, but through the coordination of separate proceedings, for which the jurisdiction of a single Court was established (the Court of the district where the parent company had its registered office). Coordination was also promoted by having the same persons appointed as the administrators in the various proceedings. Detailed provisions were conceived to reinforce the liability of the controlling entity and of its bodies for any abuse in the exercise of the management and coordination powers or any misuse of the legal personality of the subsidiaries. Finally, a more severe regime on voidable transactions was designed in relation to acts and dispositions carried out by a debtor with related parties.

The other one was the Democratic Party Bill (2004), which also included an articulated regime on groups. Without entailing any substantial consolidation of the relevant group entities, the proposal was mainly based on coordination among separate but related proceedings. In order to foster coordination, the following tools were included: the possibility for a joint application to be filed by two or more members of the same group or by the parent company also on behalf of one or more subsidiaries; the possibility to file an application regarding subsidiaries in both actual and imminent insolvency; the appointment of the same administrator/s in the various proceedings of different group members; having the jurisdiction of a single Court; the possibility for two or more group enterprises to submit a single proposal for a composition agreement with creditors comprising all the enterprises concerned, still keeping their respective assets distinct and separate.

The Bill also included a strengthening of claw-back powers for intra-group transactions detrimental to the rights of external creditors (including provisions on subordination) and a special regime for the liability of the parent company for damages suffered by a subsidiary as a consequence of violations

of the principles of proper company management committed by the controlling company in the exercise of its management and coordination powers over its subsidiaries.

The analysis of these past initiatives, which reflected the status of the theoretical debate at the time, shows that procedural coordination is perceived as a fundamental element of any possible regulation of group crises, while consolidation of assets is generally not allowed, as against the principle of the separate legal personality of individual group members.

8.2. Ex post coordination; treatment of intra-group transaction

A wide consensus indeed exists on the fact that fragmented solutions within a group can be prevented through appropriate procedural tools such as joint applications, exchange of information channels, joint rescue plans, deviations to ordinary rules on Court's competence, identity of the bodies in charge of the proceedings. The validity of such approach has been recently confirmed by the principles on group insolvencies approved by Uncitral in 2010 (148), where the importance of such coordination mechanisms is emphasized as the starting point to effectively address insolvency of business groups.

Coordination tools come into play once a crisis has emerged and one or more group entities are subject to an insolvency/reorganization proceeding. Other elements of an insolvency framework may have a more striking relevance *ex ante*, to the extent that they may deeply influence the structure and fashion of certain types of group relationships.

In this regard, an important aspect to cope with in a crisis scenario is the treatment to grant to intra-group transactions (in particular, intra-group asset transfers and intra-group finance). Here the possible regulatory response looks more controversial. The main purpose of past projects in this field seemed to be that of granting a strong protection to external creditors/minority shareholders through strict rules intended to discourage these types of transactions, for instance through a tough avoidance regime (both the Trevisanato and the Democratic Party Bill followed this approach), strict liability provisions, or the automatic subordination of claims deriving from intra-group lending (the Democratic Party Bill included this option).

Compensation mechanisms (and similar) are indeed necessary, in order to limit the negative effects possibly deriving from the conflicts of interests that typically affect the governance of a corporate group structure. However, adequate consideration should also be given to the important role that intra-group transactions may have within certain integrated group structures. In particular, both lending and assets' transfers should be assessed – including in a bankruptcy scenario - in the broader context of an enterprise group, where benefits and

(148) See Uncitral Legislative Guide on Insolvency Law. Part III, Treatment of Enterprise groups in Insolvency (2010).

detriments might be allocated within a more articulated picture (as discussed in paragraph 2). There are cases when conveying all money and assets available in the group to a specific project can be an effective way to put common resources to the best commercial use, thereby selecting viable projects in the interest of the group as a whole.

These aspects should be taken into account when designing appropriate regimes for liability, avoidable transactions, subordination of claims. Regulatory mechanisms should be designed in such a way as not to discourage ex ante profitable redistributions of financial resources within a group. This requires solving adequately the trade-off between the legitimate protection of stakeholders' rights and the overall (financial) group interest.

8.3. Regulatory safeguards to prevent abuses: liability, subordination, avoidable transactions

Certain solutions envisaged in the past debate and regulatory proposals seemed to offer a too narrow picture of the group reality upon occurrence of a crisis. A picture which would have contradicted, to some extent, the approach taken by the legislator in the 2003 Company law reform, whose provisions have granted legal recognition to both the concept of group interest and the legitimate prerogatives of a parent company (149), thereby offering a solution to the main controversial legal issues involved in the treatment of corporate groups (150).

Still, it needs to be recalled that the same reform has established specific safeguards in order to prevent the management and coordination powers of the controlling company from resulting in an undue and harmful interference on the business conduct of the subsidiaries.

The liability regime described in paragraph 3, which would normally come into play in case of subsequent insolvency of the impaired subsidiary, appears to offer a well balanced solution, as it aims at protecting the relevant stakeholders (creditors and minority shareholders of the controlled company), without however nullifying the asset-partitioning benefits of the group structure.

Regulatory attempts to make such liability regime harsher in case of insolvency of the controlled company should be carefully considered in their

(149) The company law reform enacted in 2003, without defining the notion of corporate group, has expressly recognized as lawful, in principle, the powers of management and coordination exercised by a parent company over its subsidiaries; has set boundaries within which interference from the holding company is permitted, taking adequately into account the interests of the group together with the interests of the subsidiaries and the interests of the minority shareholders of the latter. The reform also requires that the company's stake in a group is adequately disclosed and provide measures in favour of the minority shareholders, including the right of withdrawal, in the events that the company decides to enter or to leave a group and a take-over bid is not required by law.

(150) A great deal of *literature* has been dealing in the past decades with the problem of regulating corporate groups. A rich bibliography can be found in Rondoni, Società (gruppi di), in Dig. Discipline privatistiche. Sez. Commerciale. Aggiornamento, 5, Torino, 2009, 591 ss. On the post-reform debate see, inter alia, Angelici (2003); Pavone La Rosa (2003); Tombari (2004).

ex ante effects, since they could discourage optimal allocation of the assets and resources to be employed in a business project.

Going back to the Trevisanato Bill, this proposal suggested to establish a liability of the controlling company in any case of abuse in the exercise of its coordination powers and any misuse of the separate legal personality of the group components (independently from the existence of conflicts in the pursuing of the holding and the subsidiary interests) (151), and to extend such liability to the management bodies of the controlling company, along the lines already followed by the Law on Special Administration of Large Enterprises (152). Precisely this provision, which aimed at introducing exceptions to the general regime under company law, created a fracture within the Trevisanato Commission, some members of which (including representatives of Banca d'Italia, ABI and Assonime) were against the idea of extending the boundaries of the ordinary liability regime set out for corporate groups in case of insolvency of a subsidiary, and for this reason proposed an alternative version of the reform project (153). The main concern of the opposing members was the risk to frustrate the benefits of conducting a common project through related but separate legal entities, by making the position of directors of a holding company exposed to excessively high risks and uncertainty.

This reasoning not only appears in line with the economic literature on corporate groups, but is also consistent with the international legislative trends on this topic, which show the propensity to follow -including when insolvency occurs - the general principles of corporate law regarding the limited liability of each legal entity (except for cases in which a controlling company has acted as a “de facto director” or conditions exist for “piercing the corporate veil”) and the individual liability of directors in case of misuse of managerial powers.

Additional insolvency-specific liabilities are provided under certain jurisdictions in order to prevent continuation of business when insolvency has materialized. Within this category fall the provisions on “wrongful trading”, which require directors (including shadow directors) of a group member to monitor, for example, whether that group member can properly continue carrying on business in the light of its financial conditions and to apply for insolvency within a specified period once it has become insolvent. The wrongful trading approach, which circumscribes the sanctioning to a specific behavior carried out by controlling directors in the eve of insolvency, in order to promote early interventions and to avoid the worsening of a crisis, represents a more desirable

(151) On the wider scope of the liability regime envisaged in the Trevisanato Bill see Meoli (2004).

(152) Pursuant to Article 90 of Legislative Decree n. 270/1999, in case of coordinated management of group enterprises, the directors who have abused of their management powers are jointly and severally liable with the directors of the insolvent company for damages suffered by the latter as a consequence of the instructions given by the controlling company.

(153) For additional details on the works of the Trevisanato Commission and its internal divisions see Bianchini-Panucci, 2006.

option than that of broadly extending the boundaries of corporate liability, whose counterproductive effects, as above illustrated, may be significant (154).

A careful reconsideration along these lines should be deserved also to the other specific regulatory safeguards, respectively regarding intra-group finance and intra-group transfers of assets.

As regards financing, the remedy of subordination, which responds to the need of preventing inadequate capitalization of an entity (so that it does not have an adequate capital basis for carrying out its operations), should not be conceived as an automatic measure, since this could unduly restrict also efficient mechanisms of intra-group financial support. Subordination may put at risk the viability of the subordinated group member and be detrimental not only to its own creditors, but also to its shareholders, with the effect of deterring intra-group lending.

In this perspective, the solution offered by Article 2497 quinquies could result in a too penalizing mechanism, if rigidly interpreted as not allowing exemptions, for example, for financial transactions carried out in the ordinary course of business-specific group relationships, or otherwise intended to support a successful reorganization project.

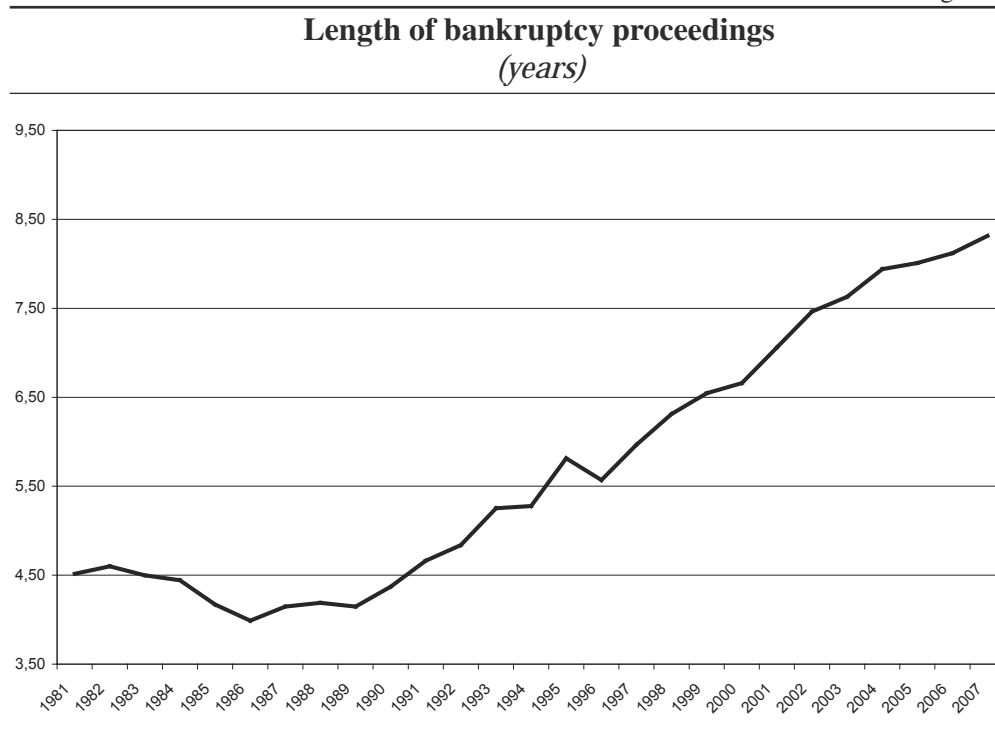
Finally, as regards intra-group transfers of assets, regulatory attempts to strengthen the avoidance regime applicable to such transactions should be taken with caution, having in mind that automatisms in the burden of proof or mechanical extensions of the suspect periods could not be justified in relation to highly integrated groups where resources could be placed or channeled on the basis of specific economic parameters in the best interest of the group as a whole. In this regard, the principles elaborated by Uncitral on this topic could represent a useful guidance for possible future regulatory initiatives. Pursuant to these principles, consideration should be given in particular to: a) whether a transaction contributed to the operation of the group as a whole; b) whether a transaction occurred within the ordinary course of business of the group members concerned. Such approach gives adequate relevance to those situations where finance may only be available on an intra-group basis and hence there would be no reason to treat such form of lending more strictly than if it involved an external lender. In conclusion, any law policy on avoidable acts should appropriately take into account that transactions occurring within a group, although not always carried out at market prices, might correspond to a legitimate economic interest, provided that they were conducted without fraudulent purposes and took place in the ordinary course of (the specific) business of the group members concerned.

(154) According to Tombari (2004) a legal basis for a liability for wrongful trading of the holding company could already be found in article 2497 of the civil Code.

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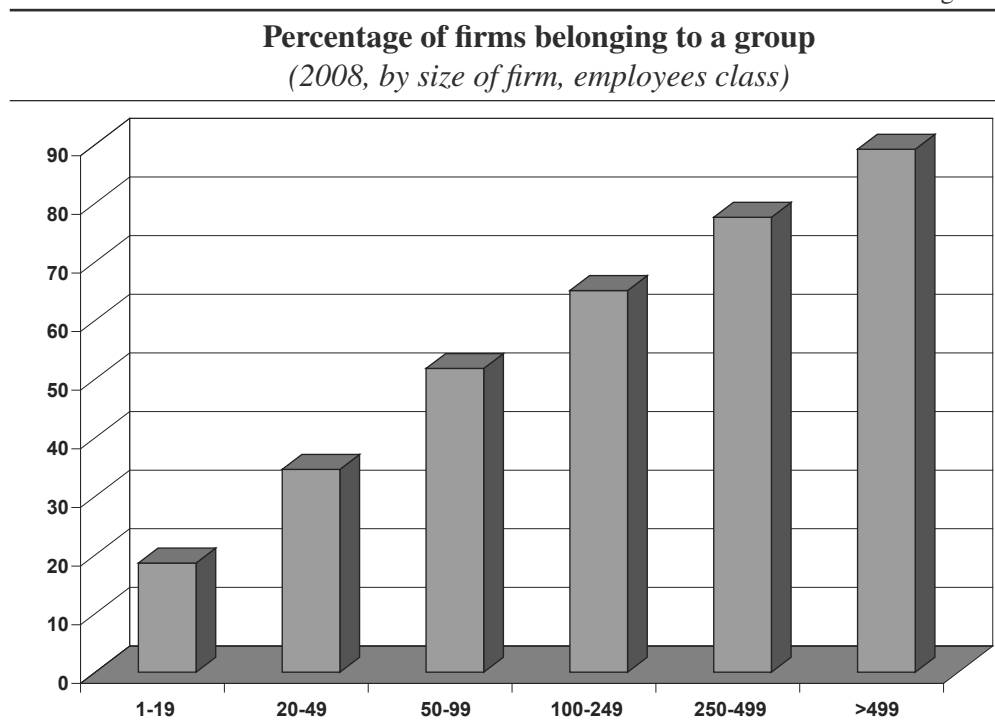
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Figure 1



Source: Istat.

Figure 2



Source: Istat (2009).

**Multinational Enterprise Groups in Insolvency:
A Comment on UNCITRAL's Proposals and Future Prospects
within the EU**

Irit Mevorach

1. UNCITRAL's focus on communication and cooperation mechanisms. – 2. A comprehensive framework for cross-border insolvency is available in the EC context and can be extended to groups. – 3. Willingness of EC courts to centralize group proceedings. – 4. A note on the English decision in Stanford. – 5. Concluding remarks.

1. UNCITRAL's focus on communication and cooperation mechanisms

UNCITRAL Working Group V (which deals with insolvency issues) in its deliberations on the international aspects of enterprise group insolvencies has considered developing the concept of 'enterprise group centre of main interests (COMI)', namely the identification of the economic centre of the group where all insolvency proceedings against group members could be handled in a unified manner. This did not culminate into concrete recommendations. At some point it was suggested to 'reduce' this idea to a concept of a 'group coordination centre'; that is - instead of centralizing all proceedings in one place- designating one of the forums as the leader. Yet, this too was eventually abandoned as the Working Group did not reach a consensus on the particular role which will be given to the leading forum. Ultimately, UNCITRAL's current proposals on the international aspects of group insolvencies (which will be included in the UNCITRAL Legislative Guide on Insolvency Law) now focus on cooperation and communication between (at least initially, unless the parties voluntarily agree otherwise) separate and parallel insolvency proceedings against group members.

Certainly, the proposals of UNCITRAL represent a breakthrough in the area of group insolvency as almost for the first time they suggest ways to treat international groups in default. In addition, no doubt that cooperation and communication (between affiliate companies) is a better approach than one which ignores the links between group members and suggests handling the proceedings on a state-by-state and completely separate basis (even where the group represented something which is worth more than the sum of its parts). However, in many cases, centralization- or at least coordination via one leading jurisdiction- may better promote insolvency goals: facilitating an efficient insolvency process and a fair one, where one court can consider the interests of all relevant parties wherever located and coordinate solutions beneficial for the group as a whole. Especially restructurings will be facilitated. In an ideal world cooperation between parallel processes can lead to efficient reorganizations but this may not be the case where different interests are involved and where local creditors may fear that other members may proceed in ways detrimental to them- ultimately the various entities' creditors may pull to different directions. Fast and smooth large scale reorganizations can be facilitated (and predictability enhanced) by designating ex ante (in advance of collapse) one forum as the coordinator, or preferably (at least for the integrated and centralized groups) the sole forum handling the case (155).

In the context of UNCITRAL the problem was the absence of an existing model with rules on international jurisdiction and automatic recognition. The fear was that a group COMI concept will not be enforced because the UNCITRAL Model Law on Cross-Border Insolvency is not adequate enough for this purpose.

(155) The diversified scene of group insolvencies should be taken into account, though. For example, if the group was a decentralized one, a better approach would be to coordinate the proceedings centrally but allow the opening of local proceedings (see I Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP, 2009), ch 6).

There was also a concern that ‘group COMI’ is too intrusive to state sovereignty, and generally that COMI is a fuzzy and vague notion, thus extending it to groups may be too far-fetched (156).

2. A comprehensive framework for cross-border insolvency is available in the EC context and can be extended to groups

Within the EU, though, Member States (participating in the EC Regulation on Insolvency Proceedings) have already agreed to surrender a degree of state sovereignty for the purpose of achieving more efficient and fair cross-border insolvencies, and restructurings- by embracing a coherent framework for this purpose with rules on international jurisdiction and automatic recognition. Thus, it has been agreed that the forum where the COMI of the debtor company is located will handle the main proceedings and that other jurisdictions should recognize it automatically. A similar concept can apply in the group context, at least for integrated centralized groups: the forum where the centre of the group is located will handle the main process and others will recognize it (if necessary there will be secondary proceedings but where this is not necessary such duplication of proceedings should be avoided). The ‘corporate veil’ (separating between the group members) is not ‘lifted’ by such a concept - the group as a whole is being considered only for jurisdictional purposes; state sovereignty is not breached either- not more than it already is, based on the EC Regulation as it stands. But this does require to do away (to an extent) with the incorporation theory in the insolvency context- as it applies to each group member separately (that is- placing the proceedings in the place of incorporation or registered office of each group entity), and instead- look for the economic centre of the group as a whole- referring usually to the head office from where it was managed.

3. Willingness of EC courts to centralize group proceedings

I suggest that developing such a group COMI concept is also feasible. In the EU, courts have already went further than just apply cooperation and communication mechanisms between parallel separate proceedings against group members. Courts have been pragmatic and found a mutual centre, *de facto*, even in the absence of an explicit group COMI concept in many cases concerning groups. An explicit concept and a definition are nonetheless necessary in light of some conflicting cases (and the approach expressed in *Eurofood* (157) which may be perceived as going in a different direction). All in all, though, a consideration of the experience and the body of decisions regarding COMI determination (applying the EC Regulation) shows that courts in the EU are quite willing to embrace jurisdictional tests which are based on economic realities rather than mere formalities. In particular, a recent empirical study of EC Regulation cases

(156) See I Mevorach, *Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency* (18, *Cardozo Int'l & Comp. L.* 359 (2010)).

(157) *Eurofood IFSC Ltd* (Case C- 341/04) European Court of Justice 2 May 2006; [2006] OJ 2006 C143/11; [2006] Ch. 508.

(decisions involving COMI determination) has shown that in the majority of cases where Member States' courts (from different jurisdictions) were faced with a scenario where the company could be perceived as connected to different jurisdictions (e.g.- the registered office was in country X, and the head office or the principles place of business or other factors in country Y) they tended to rebut the presumption that COMI is located at the registered office of the company, and quite consistently emphasized the head office functions as a key connecting factor (158). This is conducive to centralization of groups. As aforementioned, by adopting a jurisdictional test which is based on economic realities, in particular where it focuses on the management of companies, a group centre can be identified and group solutions can be promoted. Generally, this may mean that the COMI notion is not considerably fuzzy and vague in practice and so extending it to the case of enterprise groups is perhaps not too far-fetched.

4. A note on the English decision in Stanford (159)

The English decision in the case of Stanford has applied the English UNCITRAL Model Law Regulation (160) (it was not an EC Regulation case). However, the court did apply EC Regulation concepts and in particular the ECJ decision in Eurofood (161). The court of first instance almost expressed 'contempt' to the "simple head office test" – which was emphasized by the same court in a previous case (Lennox). Instead, this time, the court emphasized appearances to third parties as a leading factor. Based on that it considered Antigua to be the COMI of SIB- one of Stanford companies (and not the US from where the group was ultimately controlled).

This may mark a start of a new trend where Member States' courts (when applying the EC Regulation) will abandon the head office test in the group context and regressively emphasize incorporation of each group member and appearances. In the case of Stanford it was actually shown that SIB was managed in Antigua (and so the group as a whole or at least this part of the group could be regarded as a decentralized one and there might have been sense in conducting local Antiguan proceedings (162)). But, in other cases the head office may be in a place other than the place of incorporation, the group may be centralized and a unified process may be impeded if too much weight is given to the presumption and to potential expectations by third parties which may derive from a number of additional (even if objective) factors. Although third parties' expectations is a crucial factor in COMI determination (and the group context is no exception), it should not be detached from economic realities, especially bearing in mind that

(158) See I Mevorach, "Jurisdiction in insolvency - a study of European courts' decisions" (Journal of Private International Law, 2010, vol. 6, No. 2).

(159) Stanford International Bank Ltd (In Receivership), Re Chancery Division (Companies Court), 03 July 2009; [2009] EWHC 1441 (Ch); Stanford International Bank Ltd, Re [2010] EWCA Civ 137.

(160) The Cross-Border Insolvency Regulation 2006.

(161) Note 159 above.

(162) Though this should still be linked in some way to the American process (see note 157 above).

‘creditors’ or ‘third parties’ may not be a coherent group and may include types of creditors (like involuntary creditors) who could not tell in advance any way what will be the jurisdiction and law that will preside over the process. All in all, it is important to conduct an insolvency case in the real centre of the company and if the group was a centralized one that centre may well be a mutual one if one looks to the head office functions factor as a key factor in determining COMI. It is reassuring, though, that one of the judges in the Court of Appeal’s decision in *Stanford*- re-emphasized the head office test as the key one in COMI determination (163).

5. Concluding remarks

It seems that it is both desirable and feasible to achieve comprehensive solutions for groups in the EC context. Where groups operated de facto as a single business the aim should be to centralize them at the economic centre- usually the head office- rather than spread them all over the places of incorporation of the different entities (especially for the purpose of restructurings). The EC Regulation provides the infrastructure for that- as it contains international jurisdiction and automatic recognition concepts. There is also a considerable body of precedent to rely on- where we can see willingness of courts to embrace jurisdictional tests based on economic realities (which could extend to the group as a whole). We should not regress into focusing on each company separately which is an inevitable by-product of an application of a strong presumption of incorporation. For other types of groups (which were more decentralized) less ambitious solutions may be more adequate, for example subjecting the process to a leading forum or cooperating between parallel proceedings- as suggested by UNCITRAL.

What could ensure better consistency and predictability in this respect is the development within the Regulation of a clear and explicit group COMI concept, while learning from UNCITRAL experience in its attempt to shape a group COMI definition (delineated in the working paper of Working Group V). This will have another advantage- by doing that the EC Regulation will also improve the COMI notion in general (a notion which is central to its application). As a large number of cross-border insolvency cases are cases of groups- improving COMI (i.e. developing a clearer definition and explanation of its meaning) highly depends on improving it in the context of groups. A definition or explanation of meaning of COMI in a group context may also take into account different types of groups and how the role designated for the main forum may change accordingly.

(163) *Stanford International Bank Ltd*, Re [2010] EWCA Civ 137, Para. 152.

Latest developments in Switzerland: the Swissair insolvency and (some of) its ongoing consequences

Rodrigo Rodriguez

1. Overview. – 2. The Sabena vs. Swissair case before the ICJ. – 2.1. Procedural Background of the case (in chronological order). – 2.2. Decision of the Swiss Federal Court (résumé). – 2.3. Legal Background of the Swiss decision. – 2.4. Comments on the Swiss decision. – 2.4.1 Author's view. – 2.4.2 Could the Swiss Federal Court have decided differently? – 2.4.3 Is Belgium's Claim before the ICJ justified? – 2.4.4 Is there a way out of these difficulties? – 3. The reform project on Swiss restructuring procedures. – 3.1. Current situation of Swiss restructuring law ("procedura di risanamento"). – 3.1.1 Legal sources currently in force. – 3.1.2 Effective functioning. – 3.2. The Reform project in a nutshell. – 3.3. A word on the international context. – 3.4. Particularities in respect of bank insolvencies.

1. Overview

The author was asked to focus on two particular developments involving Swiss insolvency law : First, on a case currently pending before the International Court of Justice in The Hague (“ICJ”) concerning a major group insolvency case, namely the insolvency of the Swissair-Group and related companies like Belgium’s Sabena.

The second issue briefly presented concerns the ongoing legislative reform aimed at reforming the Swiss restructuring procedures in Swiss insolvency law. Both issues are insofar related as the law reform in question was triggered by the experiences made from the Swissair case.

2. The Sabena vs. Swissair case before the ICJ

The case presented hereinafter is one of more than 80 court decisions related to the Swissair insolvency (in Switzerland alone). It is, however, the first to have reached the International Court of Justice in The Hague (!).

The decision that has triggered Belgium’s claim against Switzerland before the ICJ is that of the Swiss Federal Court of 30 September 2008 (BGE 135 III 127) (164). The facts underlying this case are briefly exposed hereinafter.

2.1. Procedural Background of the case (in chronological order)

- On 3rd July 2001, the State of Belgium (owner of the former airline “Sabena”) et al. filed a claim against SAirLines (domiciled in Switzerland – then “Swissair”) before a civil court in Belgium.
- Between October 2001 and April 2002, insolvency procedures (provisional administration/ “commissario provvisorio”) were opened over SAirLines before the court in Zurich.
- The claim of the State of Belgium was dismissed by Belgian’s court of first instance. The decision was then appealed before the Belgian Cour d’Appel.
- On 8 August 2006, the State of Belgium filed its claim in the insolvency proceedings of SAirLines. The claim was combined with a request to suspend the procedure establishing the schedule of claims (“graduatoria”) until a decision is issued by the Cour d’Appel which is to be taken into account in the final establishment of the schedule of claims.
- The request for suspension was granted by Zurich’s courts of first and second instance but refused by the Swiss Federal Court by its final decision of 30 September 2008.
- On 23 December 2009, the State of Belgium filed an application opening proceedings against Switzerland at the International Court of Justice in The Hague.

(164) The full text is available under: www.bger.ch (giurisprudenza/indice DTF).

2.2. Decision of the Swiss Federal Court (résumé)

The decision of the Swiss Federal Court of 30 September 2008 stated essentially what follows:

- The outcome of the civil procedure pending before the Belgian court is of no relevance for the insolvency procedures in Switzerland as the decision could not be recognized in the framework of said procedures.
- As a consequence, the Belgian request to suspend the Swiss claim verification procedures (which take place in the context of the insolvency procedures) is refused and the claim of the Belgian State against SAirLines shall be decided exclusively on the grounds of the Swiss insolvency proceedings' schedule of claims.

In the following, the legal grounds and the pre-existing case law on which the case was based are briefly presented.

2.3. Legal Background of the Swiss decision

The European Insolvency Regulation (o 29 Mai 2000, 1346/2000, hereinafter “EuInsReg”) is not applicable to Switzerland. The case was therefore to be decided on the basis of Swiss (internal) law (see III.1) and of the Lugano Convention of 16. September 1988 (“LC”), where applicable.

According to Swiss insolvency law, all claims pending in civil courts against an insolvent debtor are suspended until the administrator takes a decision on their continuation (165). If he decides to take over the process, the civil claim becomes *ex lege* a claim verification proceeding for the purposes of preparation of the schedule of claims under insolvency law. The civil court will then not only decide on the substance of the claim itself but also on insolvency-specific issues like the exception of avoidance or its ranking.

In a constant case law, the Swiss Federal Court has maintained that such continuation and transformation of pending civil procedures was only possible and applicable to procedures pending before Swiss courts, stating (among other reasons) that only Swiss courts could guarantee the application of mandatory rules of Swiss insolvency law (BGE 133 III 386). In a prior case (concerning France) the Swiss Federal Court had set forth, that “as long as [f.i.] the French judge is not obliged to recognize the effects of the Swiss insolvency proceedings and, as a consequence, to suspend its (civil) procedures, there is also no basis on which the power of the Swiss insolvency judge to assert and allocate the claims could be restrained”. The facts and the legal basis were similar in the discussed Sabena case. Consequently, the Federal Court decided that the Belgian state’s claim against Swissair and all questions arising in connection with this claim (of

(165) Art. 207 Legge federale dell’11 aprile 1889 sulla esecuzione e sul fallimento (LEF), <http://www.admin.ch/ch/i/rs/c281_1.html>.

substantial and insolvency nature) were to be dealt with exclusively by the Swiss insolvency judge based on the Swiss insolvency procedure.

As the Belgian decision could thus have no influence on the claim verification proceedings, there was also no legitimate interest justifying a suspension of those proceedings.

2.4. Comments on the Swiss decision

2.4.1 Author's view

The decision of the Swiss Federal Court has its inner logic (which unfortunately does not clearly appear from the reasoning) and can be justified in view of Swiss law and, in particular, in the absence of any applicable international treaties. The author bases its view on the following considerations:

1. The Lugano Convention of 16 September 1988 ("LC") (166) does not come into play for the application of the rule of *lis pendens*, as at least one of the procedures was clearly not subject to the LC (this is not explicitly said in the decision). Swiss courts were thus not bound (by the LC) to stay the procedures.
2. This said, and in the absence of clear provisions of national law, Swiss law can be interpreted as wishing to concentrate the proceedings in one forum or at least one jurisdiction in order to guarantee the accurate application of specific insolvency rules (*vis attractiva*). This consequence is not uncommon to insolvency regimes and has even been recently adopted by the European Court of Justice ("ECJ") in the context of the European Insolvency Regulation ("EuInsReg") (ECJ, 12. 2. 2009 – C-339/07 - Deko Marty Belgium).

However, the decision does show some incoherencies in the reasoning:

1. The LC is either not applicable or it justifies an exclusive jurisdiction under art. 16 Nr. 5 LC (the latter is said in the decision). It cannot do both. If the bilateral agreement Switzerland-Belgium (167) contains an exclusion of "insolvency procedures" (the Federal Court excludes its application on that basis), the same is true for the identical exclusion contained in the LC. Accordingly, art. 16 Nr. 5 LC does not come into play but rather the exception of art. 1 para. 2 LC (insolvency proceedings).
2. It is incorrect to say that the Belgian claim is not subject to the LC and that it could not be recognized in Switzerland because it is not anymore a matter of "private international law". The Belgian proceedings remain civil proceedings subject to the LC. It is (only) the Swiss procedure in which

(166) Convenzione del 16 settembre 1988 concernente la competenza giurisdizionale e l'esecuzione delle decisioni in materia civile e commerciale (Convenzione di Lugano) (con Protocollo e Dichiarazioni), <http://www.admin.ch/ch/i/rs/c0_275_11.html>.

(167) Convenzione del 29 aprile 1959 tra la Svizzera e il Belgio circa il riconoscimento e l'esecuzione delle decisioni giudiziarie e delle sentenze arbitrali, <http://www.admin.ch/ch/i/rs/c0_276_191_721.html>.

framework the decision was to be recognized and to have a relevance that is not subject to the LC. In that procedure, aimed at establishing the schedule of claims in the framework of the Insolvency proceedings, the foreign decision is not taken into account. This is perfectly admissible, given that these (insolvency) procedures are not subject to the rules of the LC. The Federal Court unnecessarily focuses on the claim in Belgium instead of focusing on the Swiss (insolvency) procedures.

3. It is incorrect to apply the rules of cantonal law on *lis pendens* because the Swiss Code of International Private Law contains its own (applicable) rule (168). However, the outcome would have been the same.

2.4.2 Could the Swiss Federal Court have decided differently?

Yes. The Federal Court could have decided to recognize the decision applying the LC, limiting the effects of the recognition to the substance. The Insolvency court establishing the schedule of claims then would only be bound by the decision as to the substance but would freely examine all other insolvency related issues, for instance opposable avoidance or the ranking, and assess the claims on that basis. This is the solution proposed by a large part of the doctrine and defended by the prior instance, the supreme Cantonal Court of Zurich (169) as with the following reasoning: “there is no reason why a decision of a foreign court that can be recognized in Switzerland should not be binding in the Swiss insolvency procedures (schedule of claim) in the same manner as a Swiss decision”. However, the Federal Court preferred a different solution and based its decision on the advantages and simplifying effects of the *vis attractiva*.

2.4.3 Is Belgium’s Claim before the ICJ justified?

No. It is not justified in terms of procedural law, because:

- the LC does not apply to insolvency proceedings. Neither does it apply to procedures closely related to insolvency proceedings such as the claim verification procedures for the purposes of the schedule of claims. (ECJ, 22.2.1979 – 133/78 – Gourdain/Nadler). Unlike between (most) EU Member States, there is unfortunately no parallel convention to the EuInsReg that would “take up” these cases falling outside the LC.
- Accordingly, Switzerland’s internal law is free to give or not to give to foreign pending procedures a stay in the establishing of the schedule of claims. In the case at hand it refused to do so.
- The decision of the Federal Court to concentrate the fora of insolvency and insolvency-related procedures at the place of the opening of the insolvency is in line with the insolvency laws of many states and even with the newest

(168) Art. 9 Legge federale del 18 dicembre 1987 sul diritto internazionale privato (LDIP), <<http://www.admin.ch/ch/i/rs/c291.html>>.

(169) See BGE 133 III 386, E. 4.3.2 and E. 4.3.3 with further references, available at the following address: www.bger.ch.

ECJ-Case law (ECJ, 12. 2. 2009 – C-339/07 - Deko Marty Belgium) under the EuInsReg.

In the view of the author, the claim is further not justified in terms of international public law, as Belgium did not proceed in accordance with Protocol Nr. 2 of the LC and never referred the issue to the Standing Committee. Instead, a procedure was chosen that is outside the agreed mechanism provided by the LC itself. These same mechanisms show that the LC accepts the possibility of differing interpretations (though it tries to avoid them), leaving their remedy explicitly to political negotiation (reform of the convention or new agreement). More arguments could probably be drawn from other principles of public international law, but this is not the subject of this seminary.

2.4.4 Is there a way out of these difficulties?

Not for the current case and not in the near future. Claimant's judiciousness or political negotiation could lead to Belgium withdrawing its claim. If not, it is difficult to see how the ICJ could issue anything other than a dismissal. The decision of the ICJ could, however, open the eyes of the parties involved to the necessity of finding a negotiated and forward-oriented solution.

An obvious option could consist of a parallel Convention to the EuInsReg. If such a Convention had already existed, the case at hand would have fallen into the scope of that Convention and an appropriate solution would have been found (probably recognition in application of the corresponding provision to art. 25 EuInsReg). Such a Convention does, however, not exist yet and it is difficult to conceive the ICJ imposing its same effects through an extension of the LC.

3. The reform project on Swiss restructuring procedures

3.1. Current situation of Swiss restructuring law (“procedura di risanamento”)

3.1.1 Legal sources currently in force

The basic source of Swiss insolvency and restructuring law is the Swiss debt recovery and bankruptcy act of April 11, 1889 (170).

The latest revision of the legal norms on restructuring law dates back to a reform in 1996. Though that reform was at that time announced as introducing “a true restructuring law”, the restructuring procedures of Swiss law have had and still have little success in practice.

(170) Legge federale dell'11 aprile 1889 sulla esecuzione e sul fallimento (LEF), <http://www.admin.ch/ch/i/rs/c281_1.html>.

3.1.2 *Effective functioning*

According to a recent study by Ernst & Young (171), Switzerland has one of the lowest recovery rates in comparison with states with a similar economic structure and, as a consequence, an extremely low percentage of restructuring proceedings.

The reason for this lies, in the author's opinion, in the fact that Swiss restructuring law has very little to offer to the company in distress. Initiating the procedure is not only expensive but troublesome and public. The restructuring procedures under insolvency law offer hardly more than what is already available under private or corporate law. The only additional tool lies in the possibility to overrule a minority of creditors – admittedly at the price of a procedure that is often even more costly than paying them off up front. The consequence of this limited mean and its disproportionate cost (particularly in terms of the company's reputation) may often lead the companies in financial distress to avoid entering into insolvency procedures for as long as possible. When they finally do become unavoidable, the company in question has definitely run out of cash and to restructure it is virtually impossible.

3.2. **The Reform project in a nutshell**

The current reform project was triggered by the insolvency of the Swissair Group in 2001/2002. The question in the aftermath of that traumatic bankruptcy was raised whether a more sophisticated and more restructuring-friendly insolvency law – similar to chapter 11 of the US Bankruptcy Code - could have avoided the bankruptcy of the Swissair Group and whether future insolvencies of large groups could be avoided or the consequences mitigated by appropriate legislative measures. The Swiss government decided to convene a panel of experts to come up with a report on the current legal restructuring provisions and to make suggestions for a possible reform. The report was delivered in 2008 (172). Its main conclusions were the following:

1. The law of 1889 does not need a fundamental or major reform in order to address group insolvencies. In particular, the atomistic approach (dealing with each individual entity of the group irrespective of the existence of a group) of the law has not hindered an efficient administration of the Swissair insolvency; however
2. certain modifications to improve the current restructuring procedures in insolvency are advisable.

(171) Ernst & Young, *Comparaison internationale du droit des faillites Suisse*, dans: *Trois études sur la révision du droit des faillites*, Etudes mandatées par le Secrétariat d'Etat à l'économie et l'Office fédéral de la justice, Grundlagen der Wirtschaftspolitik Nr. 19, Berne 2010.

(172) Available in Italian at the following address: www.bj.admin.ch/etc/medialib/data/wirtschaft/gesetzgebung/schuldbetreibung_und.Par.0011.File.tmp/vn-ber-i.pdf.

Based on this report, the Federal Government has made a legislative proposal to reform the current provisions on restructuring in insolvency law (“procedura di risanamento”) (173). The modifications contained in the reform project are of a considerable importance. They involve (i.a.):

- the creation of a “secret” (non-published) pre-restructuring procedure (including a stay and the naming of a provisional administrator);
- the possibility for the administrator to rescind long term contracts against compensation, and
- the elimination of the obligation to take over employment contracts.

Despite the main conclusion from the group of experts that no particular legislation regarding group insolvencies was necessary, the legislative proposal includes two provisions specifically aimed at taking into account the group context of an insolvency of several closely related companies, namely:

1. A new provision creating the possibility for the different competent courts to agree up on a common forum for the insolvency of companies of a same group that would (under general rules of jurisdiction) have to be opened in different courts. The feasibility and practical relevance of this solution based on the voluntary agreement of the courts has yet to be proven.
2. Two new assumptions in the context of avoidance provisions that apply to related companies. Accordingly, (1) knowledge of one member of the group of the financial situation of the other member of a group, and, (2) knowledge of a disproportion between the performances of a contract between related companies of a group are presumed by law. The related company has the burden of proof to the contrary (that it did not know about the financial distress of the related company or about a disproportion of the performances in a contract).

The possibility of including cases of substantial consolidation (pooling of all assets of the companies of the group) was examined by the group of experts but finally rejected due to concerns against modifying or annulling an existing situation upheld under corporate law. These concerns ultimately outweighed the possible advantages.

In this context, it must be noted that practice has developed further possibilities to coordinate the procedures in a group context which are not explicitly mentioned by the law. The most important is that of naming one common administrator for different companies of the same group, as it was made in the Swissair group insolvency (174). It must also be noted that communications between courts or between courts and administrators are already permitted on an informal

(173) Available in Italian at the following address: www.bj.admin.ch/bj/it/home/themen/wirtschaft/gesetzgebung/SchKG.html.

(174) The common administrator of all companies of the group liquidated in Switzerland was joined by separate Co-Administrators, one named for each of the companies. Their task was to take over issues where conflict of interest could arise, i.e. in all intra-group claims. See details of the Swissair Insolvency procedures under www.liquidator-swissair.ch.

basis. Swiss courts and insolvency administrators have entered into at least two cross-border protocols, one of them in the context of the Swissair case (175). There may (still) be no explicit legal basis for such agreements but also none prohibiting them. In the end, the most important developments in respect of group insolvencies have been happening “outside” the legislative process by an innovative interpretation of the law.

3.3. A word on the international context

The current revision of Swiss insolvency law focuses on the internal restructuring procedures. International insolvency law remains completely unaffected by the revision. Foreign insolvency administrators having assets to recover in Switzerland will thus still have to face the current and uncomfortable legal situation, as:

- Switzerland cannot participate in the European Insolvency Regulation and is not part of any bilateral agreement worthy of note;
- Switzerland has not (yet) adopted the UNCITRAL Model Law and has a very cumbersome procedure for recognition with a mandatory secondary proceeding; and therefore
- foreign administrators need to undergo recognition procedures and a secondary proceeding for any action to be taken in Switzerland (176) if they do not want to be exposed to criminal charges (177).

Switzerland is usually on the receiving end of requests for recognition. It is a place where assets are placed that foreign administrators would like to claim. So, there will hardly be any political pressure from the local service industry (especially banks) to improve the current system. There has also been no interest – so far – from the European Commission to negotiate such an agreement with Switzerland or any other third state. One could imagine, for instance, a parallel convention to the EuInsReg in order to include the EFTA States (Switzerland, Norway and Iceland) and Denmark as it exists with the Lugano Convention of 30 October 2007 (and before, the same of 16 September 1988). Meanwhile, bilateral agreements between Switzerland and the EU Member States are de facto blocked by the exclusive competence of the European Union in that matter.

3.4. Particularities in respect of bank insolvencies

Like most legal systems Switzerland has a specific regime for Bank insolvencies. This regime is not affected by the reform of the general provisions.

(175) One protocol involved the insolvency administrator of Swissair (in Switzerland) and the administrators of the English wind-down proceedings of the subsidiaries of Swissair in Switzerland. Another protocol involved the administrator of Swissair (in Switzerland) and the administrator of Holco SA (France), including the approval by the courts.

(176) See art. 166 ff. LDIP [Fn. 170].

(177) See art. 271 Codice penale svizzero del 21 dicembre 1937, <http://www.admin.ch/ch/i/rs/c311_0.html>.

However, very recently two provisions in respect of international bank insolvencies have been introduced in the relevant Banking law (178). Assuming that the issue might be of interest for the organizer of this conference, they are briefly exposed:

1. A provision allowing FINMA (the Swiss Financial Markets Supervision Authority) (179) to coordinate the insolvency procedures concerning cross-border bank insolvencies with foreign authorities has been added; as well as
2. a provision allowing recognition and enforcement of a foreign decision according to general rules (180) with two (important) derogations, namely
 - a. that the foreign decision can be recognized even if it was issued at the state of real seat (place of business) instead of the registered office (only place of incorporation under general rules); and
 - b. that privileged creditors abroad can file a claim in Switzerland (under general rules only such domiciled in Switzerland).

Unfortunately, the (burdensome) reference to the requirement of reciprocity (181) remains applicable also in the context of bank insolvencies.

The centralized competence within FINMA is, however, a major advantage in terms of efficiency in comparison with the ordinary regime of decentralized (cantonal or even local) courts. In fact, the very limited possibilities to build up specialized courts due to the federal structure of the judiciary (in non-banking insolvencies) are a major obstacle to an effective administration of large insolvencies in Switzerland. Whether the proposed possibility for the different (ordinary) courts to agree up on a common forum for insolvency procedures (see above III.2) will improve the situation for non-banking (group) insolvencies is still to be proven.

(178) See art. 37g Legge federale dell'8 novembre 1934 sulle banche e le casse di risparmio (Legge sulle banche, LBCR), <http://www.admin.ch/ch/i/rs/c952_0.html>.

(179) See for more information: www.finma.ch.

(180) See art. 166 ff. LDIP [Fn. 170].

(181) See art. 166 § 1 lit. c LDIP [Fn. 170].

**“Centre of Main Interests” of the Debtor under EU Regulation
n. 1346/2000 and Insolvency of Cross-Border Groups:
a Private International Law Perspective (182)**

Massimo V. Benedettelli

1. Regulation n. 1346/2000 on cross border insolvencies as a private international law instrument. – 2. The private international law method of the “jurisdictional approach” which underlies Regulation n. 1346/2000. – 3. The role of the COMI within Regulation n. 1346/2000. – 4. The varying notions of COMI according to the case law of the member States. – 5. The autonomous notion of COMI adopted by the European Court of Justice. – 6. A critical analysis of the case law of the European Court of Justice. – 7. An alternative proposal: the COMI according to the competent lex concursus. – 8. The COMI as a tool for forum (and law) shopping. – 9. The insolvency of cross-border groups of companies.

(182) This paper is an expanded version of a presentation made at the seminar *Insolvency and Cross-border Groups. UNCITRAL Recommendations for a European Perspective?* organized by the Bank of Italy in Rome on 11 June 2010. The main thesis developed hereunder had been already formulated in M.V. Benedettelli, “Centro degli interessi principali” del debitore e forum shopping nella disciplina comunitaria delle procedure di insolvenza transfrontaliera, in *Riv. dir. int. priv. proc.*, 2004, p. 499, where further bibliographical and case law references can be found.

1. Regulation n. 1346/2000 on cross border insolvencies as a private international law instrument

With the adoption on 29 May 2000 of Regulation n. 1346/2000 on insolvency proceedings (183) the EU has elected to harmonize the legal systems of the member States mainly by means of private international law techniques. This is evidenced by various factors.

First, the ground of competence justifying the EU's intervention in a field previously left to the sovereign autonomy of the member States has been found in arts. 61 (c) and 67(1) of the European Community Treaty which provide, inter alia, that the judicial cooperation in civil matters should also be achieved by promoting the compatibility of the member States' rules on conflicts of laws and of jurisdiction.

Second, as regards the policy behind the enactment of Regulation n. 1346/2000, the Recitals show that the EU legislator: (i) considers the existence within the member States of "widely differing substantive laws" as a given; (ii) consistently with the constitutional principles of proportionality and subsidiarity, wishes to achieve a "minimal" level of harmonization of such laws without impinging upon the assessment of interests made by each national legislator in shaping its insolvency regime; (iii) is chiefly concerned with guaranteeing the certainty and predictability (two traditional values of "conflictual justice") of the insolvency regime applicable to parties acting within the internal market (184).

Third, and consequently, Regulation n. 1346/2000 focuses on the classical private international law issues of jurisdiction, applicable law and recognition of foreign judgments, while making only a limited use of uniform material rules of insolvency law.

It is peculiar, then, that in the vast literature devoted to Regulation n. 1346/2000 little attention has been paid to the impact that both its nature of private international law instrument, and the underlying assumption that the insolvency regulations of the member States can legitimately differ, could have on its interpretation. This is true in general, but also specifically with regard to the notion of "centre of main interests" ("COMI") of the debtor, and to its application to the insolvency of group of companies.

2. The private international law method of the "jurisdictional approach" which underlies Regulation n. 1346/2000

As a private international law instrument, the main function of Regulation n. 1346/2000 is to coordinate the legal systems of the member States with respect to insolvencies which are connected with more than one member State.

(183) In Official Journal CE, L 160, 30 June 2000, p. 1.

(184) Cf. Recitals 2, 4, 6, 8, 11, 13, 15, 22, 23.

Such coordination is achieved on the basis of the following model: (i) the courts of the member State within whose territory the COMI of the debtor is situated have jurisdiction to open, to conduct and to close the “main” insolvency proceedings (185); (ii) such jurisdiction, once exercised, becomes exclusive (186), in the sense that it precludes the courts of other member States from exercising their judicial powers over the same insolvency, save for “secondary territorial proceedings” which can be opened before the courts of another member State where the debtor possesses an establishment, but the effects of which are limited to assets situated in such territory (187); (iii) in principle such courts are required to apply the law of their member State (188) (save for certain exceptions expressly set out in Regulation n. 1346/2000) (189); (iv) judgments issued by such courts are automatically recognized in all other member States (190) and granted the same effects they have in their State of origin (191); (v) such automatic recognition applies also to judgments issued by other courts only when they derive “directly from the insolvency proceedings” (192); (vi) all such judgments are enforced in accordance with arts. 32 to 58 (with the exception of art. 45(1)) of the Brussels I Regulation (193).

It is submitted that the model of coordination so adopted by the EU legislator shows the main features of one of the methods that, according to the most advanced legal scholarship, are used in contemporary private international law (194), namely the “jurisdictional approach” method (195).

As pointed out by one author (196), this is the method which: (a) aims to achieve the highest degree of effectiveness of a given substantive law of the forum; (b) applies exclusively to legal relationships which are strictly connected with the forum because of their objective link with the policies pursued by the forum’s relevant substantive law; (c) regulates such relationships by establishing the forum’s jurisdiction over the same, by determining that such jurisdiction is exclusive, and by applying, in principle, the *lex fori*, irrespective of any international element linking such legal relationship with one or more other States; (d) consistently with its “unilateralist” rationale, accepts that a foreign legal system may regulate the same legal relationship with respect to features

(185) Art. 3(1).

(186) Art. 3(3).

(187) Arts. 3(2), 3(4) and 27.

(188) Arts. 4, 28.

(189) Arts. 5 to 15.

(190) Arts. 16, 25(1).

(191) Art. 17.

(192) Art. 25(1).

(193) Art. 25(1), which actually refers to the corresponding provisions of the 1968 Brussels Convention.

(194) P. Picone, *Les méthodes de coordination entre ordres juridiques en droit international privé*, in *Recueil des Cours*, t. 276, 1999, p. 9.

(195) P. Picone, *Il metodo dell’applicazione generalizzata della lex fori*, in P. Picone, *La riforma italiana del diritto internazionale privato*, Padova, 1998, p. 371.

(196) P. Picone, *Il metodo dell’applicazione generalizzata*, cit., p. 422 ff.

which the forum does not intend to govern and to the extent such regulation does not conflict with the forum's law and policy.

Support for this construction can be found in Recital n. 10 of Regulation n. 1346/2000 which puts emphasis on the need to guarantee the effectiveness of only those proceedings which are officially recognized and legally effective in the competent member State, as well as in the role that the Regulation gives to the COMI of the debtor (once that notion is properly interpreted) (197).

3. The role of the COMI within Regulation n. 1346/2000

The “centre of main interests” of the debtor is an essential element of the EU regime of cross-border insolvency being simultaneously relevant: (i) as a criterion of applicability (198) for determining whether or not a given insolvency falls within the scope of Regulation n. 1346/2000 (199); (ii) as a jurisdictional criterion for determining which is the competent member State to open and conduct a “principal” insolvency procedure (200) and to issue decisions that must then be recognized and enforced by the other member States (201); and (iii) as a connecting factor for determining which law the competent court has to apply (202).

Notwithstanding this, Regulation n. 1346/00 contains only few indications as to the meaning of COMI.

Recital 13 states that the COMI of a debtor “should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”, while art. 3.1 sets out a rebuttable presumption, applicable only to debtors which are companies or other legal entities, that the COMI is located at the registered office of the debtor; and the Virgos-Schmit Report, which accompanied the document from which the EU legislator drew most of its inspiration, indicated that such presumption was justified by ... another presumption, i.e. that the registered office “normally corresponds to the debtor's head office” (203).

Therefore the reader is left with the difficult task of finding a meaning for what seems to be the very pillar on which the entire construction of Regulation n. 1346/2000 is based. It is no wonder, then, that the courts of the member States

(197) Cf. para. 7 below.

(198) On this concept, and on the need to distinguish it from the concept of “connecting factor”, cf. M.V. Benedettelli, Connecting factors, principles of coordination between conflict systems, criteria of applicability: three different notions for a “European Community Private International Law”, in *Dir. Un. Eur.*, 2005, p. 421.

(199) Recital n. 14.

(200) Art. 3(1).

(201) Art. 16(1).

(202) Art. 4.

(203) Cf. par. 75

have found different and contradictory solutions to this problem (204) and that the question has soon come before the European Court Justice.

4. The varying notions of COMI according to the case law of the member States

Almost 10 years after Regulation n. 1346/2000 entered into force, the range of meanings attributed to the notion of COMI in the case law of the member States is still quite varied.

In fact, the COMI has been held to be located, alternatively, within the member State of: (i) the debtor's "administrative seat/central administration" (i.e. the place where its internal decision-making takes place); (ii) the debtor's "administrative seat/central administration" but only if the debtor also carries out entrepreneurial activities with third parties there; (iii) the debtor's "principal place of business" (i.e. the place where entrepreneurial activities with third parties are carried out); (iv) the "administrative seat/central administration" of the holding company of the debtor, if the debtor belongs to a group of companies and (a) such group is managed in a unified way by the holding company, or (b) the activity of the debtor is "functionally linked" to the activity of the holding company, or (c) the holding company is the exclusive customer of the debtor and/or (d) the IT systems are centralized at the holding company; (v) the residence/domicile of the main creditors (in terms of value) of the debtor; (vi) the residence/domicile of the members of the board of directors of the debtor; (vii) the place where the majority of the employees of the debtor work; (viii) the law governing the main commercial contracts of the debtor; (ix) the citizenship of the members of the board of directors of the debtor; and (x) the jurisdiction of incorporation of the sole shareholder of the debtor.

These different notions of COMI have often served to justify the relevant court's jurisdiction to hear the case (and apply the law of the forum) and have given rise to positive conflicts of jurisdiction, in plain contradiction with the policy pursued by the EU legislator through Regulation n. 1346/2000. As a result, the issue soon arrived before the European Court of Justice through the preliminary rulings mechanism, but it seems that, so far, the Court has not been able to offer a workable solution.

5. The autonomous notion of COMI adopted by the European Court of Justice

The European Court of Justice has addressed the notion of COMI in two cases, Eurofood (205) and MG Probud Gdynia (206), both of which dealing with

(204) Cf. M.V. Benedettelli, "Centro degli interessi principali", cit., p. 504 ff., S. Bariatti, Recent Case-Law concerning Jurisdiction and the Recognition of Judgments under the European Insolvency Regulation, in *Rabels Zeit.*, 2009, 629, A. Mazzoni, Concordati di gruppi transfrontalieri e disciplina comunitaria delle procedure di insolvenza, forthcoming in *Riv. dir. soc.*, 2010.

(205) Judgment 2 May 2006 in case C-341/04, Eurofood IFSC Ltd, ECR I, p. 3814.

(206) Judgment 21 January 2010 in case C-444/07, Probud Gdynia sp. z o.o., in www.curia.europa.eu.

a positive conflict of jurisdiction that had arisen between two member States due to the different notions of COMI adopted by their respective courts.

In both judgments, the Court relies on a purposive interpretation by stressing that Regulation n. 1346/2000 aims to guarantee predictability and legal certainty in the complex area of cross-border insolvencies and consequently to avoid practices of forum and law shopping within the European Union.

Therefore, according to the Court, the COMI: (i) must be considered an autonomous notion of EU law, (ii) must be interpreted in a uniform way independently of any national legislation, (iii) must be identified on the basis of criteria which are both objective and ascertainable by third parties, and (iv) normally coincides with the registered office of the company, since the registered office satisfies both the requirements in point (iii) above, being the place where the company is managed and where it enters into relationships with third parties.

In particular, this implies that when the debtor is a subsidiary with its registered office in a member State which is different from the member State where the registered office of the parent company is located, its COMI can be located at the parent's registered office only if the subsidiary is a "letter-box" company which does not carry out any business, being not enough that its economic choices are or can be controlled by the parent (207).

Notwithstanding these rulings of the Court of Justice, the case law in the member States remains open to contradictory interpretations: indeed, national judges are still able to pay due homage to the totem of the "autonomous EU law notion" and then use this quite vague concept to find in favour of their own jurisdiction (208). This justifies asking the question whether the interpretation of COMI proposed by the Court is correct and consistent with the underlying rationale of Regulation n. 1346/2000 or whether a more sophisticated approach should be followed in order to better pursue the policy of the EU legislator.

6. A critical analysis of the case law of the European Court of Justice

Basically, the construction proposed by the European Court of Justice has the somewhat contradictory effect, on the one hand, of putting an heavier burden of proof on the party that wants to challenge the coincidence between COMI and registered office, and, on the other hand, of allowing such proof to be given by reference to an undetermined set of facts, i.e. whatever elements of the organization and activity of the debtor could be characterized as "objective and ascertainable by third parties". The certainly unintended consequence is that, far from achieving a uniform allocation of jurisdiction within the European "area of justice", the courts of the member State remain free to elaborate different and more or less creative notions of COMI (*rectius*: of the objective and ascertainable

(207) Cf. Eurofood, §§ 31-36, Probud Gdynia, § 37.

(208) Cf. S. Bariatti, *The Recent Case-Law*, cit., A. Mazzoni, *Concordati di gruppi transfrontalieri*, cit. (referring to two unpublished recent decisions by Italian courts).

facts through which the COMI is established) so as to satisfy their natural tendency to exercise jurisdiction whenever an insolvency affects interests of their own national community.

It is then justified to question whether the European Court of Justice's doctrine is sound and to check whether a different approach is feasible.

It is submitted that the reasoning of the Court of Justice is flawed by virtue of four simplistic assumptions.

The first one is that, when "importing" the notion of COMI from the UNCITRAL experience, the European legislator has used it as a synonym for the place where the company is managed and where it enters into its main relationships with third parties. However, while in the context of an international conference for the harmonization of a multitude of legal systems it may be necessary to elaborate a new notion which is vague enough to master and unify the different juridical institutions of many different States, this need becomes less stringent in the context of an already integrated legal system such as that of the European Union. EU law, in fact, has already elaborated the concepts of "central administration", to designate the place where the internal decision-making process of a company takes place, and of "principal place of business", to designate the place where, by implementing the decisions so taken, the company enters into most of its relationships with third parties. Such notions have been consistently used since the outset of the European integration in many different EU law instruments, from the Treaty (cf. art. 54 TFEU) to acts of secondary legislation (209), and there is no reason why in regulating the phenomenon of cross-border insolvencies the European legislator would have had to divert from them if it really intended to refer to the same concepts. In interpreting Regulation n. 1346/2000 the presumption should then go in the opposite direction, i.e. that by COMI the EU legislator meant something different.

The second simplistic assumption in the Court's reasoning is that normally the place where the company is managed and the place where it enters into its main relationships with third parties coincide. Experience shows this not to be the case, particularly when one considers companies that do business on a cross-border basis (and can, as a result, be subject of cross-border insolvencies). Indeed, the company law of many member States allows meetings of the board of directors, or of other corporate bodies (including shareholders' meetings), to be held in a place other than the place where the main establishment of the company is located, as well as in a place other than the company's registered office. Moreover, the administrative seat of a company can vary from time to time as a result of many different, even contingent, factors (e.g., the efficiency that can be achieved by convening the meeting at the headquarters of a company's holding or by holding them through video-conferences) and cannot be visible and foreseeable by third parties.

(209) Cf. many of the Directives for the harmonization of the company law of the member States enacted pursuant to art. 50(2)(g) TFEU.

The third simplistic assumption is that central administration and principal place of business normally coincide with the company's registered office. Again, this may be *id quod plerumque accidit* in a purely domestic setting, but it is certainly not the case when one deals with companies carrying out their business on a cross-border basis within the European internal market. It should be considered, in fact, that the State of the registered office normally is the State under the law of which a company is incorporated, and that pursuant to the new fundamental right to "corporate mobility", which has been granted by the Court of Justice to the beneficiaries of the freedom of establishment, (210) entrepreneurs can choose the *lex societatis* of a member State even when there is no linkage whatsoever with the territory of such State and the company is managed and carries out its activities elsewhere. Moreover, if the European legislator really wanted to identify the COMI with the administrative seat and principal place of business of the debtor, then the presumption of art. 3.1 of Regulation 1346/2000 should have referred, more directly, to such notions, and in Recital 13 the reference contained in par. 75 of the Virgos-Schmit Report to the administrative seat would have not been deleted.

The fourth simplistic assumption is that an autonomous notion of EU law implies *a priori* no reference whatsoever to the laws of the member States. In general, it should be considered that the EU legal system, because of its functional nature and of the limited set of its competences, is structurally "incomplete", i.e. it often needs to rely on the more advanced experience of the national legal systems for the purpose of "filling its gaps" and giving a full meaning to its rules. Moreover, the constitutional principles of subsidiarity and proportionality (211) favour a policy of "minimal harmonization" pursuant to which the EU sets out only uniform principles rather than detailed rules, and guarantees to each member State a wide autonomy in their implementation. There is then no contradiction if an EU law instrument provides for an autonomous notion, but then requires the meaning of one or more of the elements of such notion to be determined on the basis of the law of a given member State: uniformity is still achieved throughout the entire EU since the judges of all member States shall be required to take the same approach in interpreting the notion, but EU law will be less intrusive in the member States' legislative autonomy. By way of example, there is no doubt that the notion of a company's domicile set forth by art. 60 of Regulation n. 44/2001 is an autonomous one; but there can be also no doubt that in order to determine where the statutory seat, the central administration or the principal place of business of a given company are located it is necessary to refer to its *lex societatis* (212).

(210) Cf. M.V. Benedettelli, Libertà comunitarie di circolazione e diritto internazionale privato delle società, in Riv. dir. int. priv. proc., 2001, p. 569.

(211) Cf. TUE, art. 5.

(212) Cf. M.V. Benedettelli, Criteri di giurisdizione in materia societaria e diritto comunitario, in Riv. dir. int. priv. proc., 2002, p. 879.

Once the field is cleared of these simplistic assumptions it becomes possible to propose a different construction of the notion of COMI, namely a construction which is more consistent with both the discretion that Regulation n. 1346/2000 seeks to grant to the member States in adopting their own insolvency laws, and with the private international law method that the EU legislator seems to have chosen for coordinating the legal systems of the member States in the field of cross-border insolvencies.

7. An alternative proposal: the COMI according to the competent *lex concursus*

As indicated above, Regulation n. 1346/2000 shows various features of the so-called “jurisdictional approach” for the solution of conflict of jurisdictions and conflict of law issues, this being a private international law method the main aim of which is to achieve the highest degree of effectiveness for a given substantive law of the forum, ergo for the interests that such law wants to protect.

It is not surprising then that the entire Regulation n. 1346/2000 is centred around the “main interests” of the debtor.

What is more surprising is that little attention has been paid by scholars and judges to what the concept of “interest” really means in this context.

In fact, in the realm of law the interests of a subject do not exist *per se* and in absolute terms, but only in connection with the conflicting, or concurring, interests of other subjects: indeed, each legal rule grants rights and sets out obligations by “balancing” the various interests that the legislator deems relevant in regulating a certain given matter. This seems confirmed by the very wording of art. 3.1 of Regulation n. 1346/2000: by giving relevance not to the “main centre” of the debtor’s interests, but rather to the centre of the debtor’s “main interests”, the European legislator indicates his awareness that the interests involved in an insolvency are not a single and homogenous element, but rather a congeries of different elements, the relevance and importance of which needs to be “graduated” in any given case.

Indeed, when an insolvency procedure is under consideration, the interests of the debtor must be identified by reference to the different subjects with whom the debtor has relationships and which the relevant insolvency law considers relevant for its purposes: classes of creditors, to be distinguished on the basis of their preferential rights and of their voluntary or involuntary nature; counterparties to pending contractual relationships; counterparties of set aside actions; employees; members of the board of directors/shareholders of the debtor; tax authorities; other “public” stakeholders.

Of course, whether any of such relationships is relevant, and whether the underlying interests are or are not “main”, depends on the content of the applicable insolvency law (and on the type of procedure opened), as well as on the facts and circumstances of the relevant case. For instance, it is obvious that procedures

directed towards the liquidation of the debtor may give more importance to the interests of its creditors, while in the context of procedures directed towards a restructuring of a distressed entrepreneur the main interests will rather be those relating to the continuity of its business, the safeguarding of employment, and the reorganization of the group of companies to which the debtor belongs.

It is then submitted that it should be up to the *lex concursus* of each member State to determine which interests are relevant for the regulation of insolvencies and how they “weight” in terms of relative importance for the achievement of the policy objectives underlying such regulation. Once this analysis is done *in abstracto*, it will be a subsequent question of fact to check with respect to any given debtor where its “main interests” are (more precisely, according to the case law of the European Court of Justice, where the debtor manages such main interests in a way which is ascertainable by the relevant counterparties), and to consequently assess in which member State the COMI of such debtor is actually located.

It could be argued that this construction of the COMI may lead to cases in which two or more member States, by applying their different insolvency laws, may legitimately consider a debtor’s COMI to be located within their territory, and that this result goes against the purpose of Regulation n. 1346/2000 of coordinating the member States’ legal systems by concentrating the “main proceedings” within a single jurisdiction. This point, however, can be easily rebutted by noting that the Regulation itself contemplates the possibility of positive conflicts of jurisdiction and solves them on the basis of the principles of priority and mutual trust, i.e. by giving precedence to the member State whose insolvency proceedings are initiated first and by obliging all other member States to recognize and enforce the measures therein adopted (213). Actually, these rules are further indirect evidence that for the EU legislator the COMI is not a self-standing notion of EU law, but needs to be “completed”, as suggested above, by *renvoi* to the *leges concursus* of the member States.

The suggested interpretation of the COMI may also lead to “negative” conflicts of jurisdiction whenever the *leges concursus* of the member States with which a certain debtor has connections all consider its COMI to be located abroad: but, again, Regulation n. 1346/2000 seems to address this (quite theoretical) scenario too, when it provides that “territorial proceedings” can be opened in a member State as long as “main proceedings” cannot be opened in the member State in which the debtor’s COMI is located (214).

8. The COMI as a tool for forum (and law) shopping

To maintain that under Regulation n. 1346/2000 the COMI of a debtor is an autonomous notion of EU law which needs to be “completed” through a *renvoi*

(213) Cf. art. 16(1), Recital n. 22.

(214) Cf. art. 3(4)(a).

to the different insolvency laws of the member States implies that, as a matter of EU law, it is possible that the same debtor may legitimately have more than one COMI.

Given the abovementioned principles of priority and mutual trust through which the Regulation coordinates the potential overlap of the jurisdictions of the member States, this implies also that the Regulation makes a forum (and law) shopping possible. Indeed, the party wishing to open an insolvency procedure (be it a counterparty of the debtor or the debtor itself) may be able to choose among the various member States of the COMI and, by filing there its application, may determine both the legal system which shall have exclusive jurisdiction over the insolvency and the applicable law.

One may wonder whether this result is consistent with the main objective of Regulation n. 1346/2000 which is to ensure a full coordination among the member States' legal systems within the European area of justice.

First, it should be remarked that this forum (and law) shopping will be possible in a limited set of circumstances only, i.e. only in truly cross-border situations when, on the one hand, the relationships between the debtor and its various counterparties are indeed managed by the debtor in different member States, and, on the other hand, the *leges concursus* of such member States differ in identifying what the main interests of the relevant debtor are.

These truly cross-border situations clearly do not include the situation, referred to in Recital 4 of Regulation n. 1346/2000 as an evil to be avoided, where the "internationalization" has been created artificially by the debtor through a transfer of assets or of judicial proceedings from one member State to the other for the sole purpose of obtaining a more favourable legal position. Even assuming that a *lex concursus* makes such elements relevant for the purpose of determining where the debtor manages its main interest (which is quite doubtful), this would still patently be a fraudulent behaviour, namely a fraudulent change of criteria of jurisdiction and connecting factors: a kind of behaviour which modern private international law systems normally penalise with the sanction of nullity, by providing that it does not produce the intended effects and that the relevant conflicts of jurisdiction and of laws must be solved on the basis of the rules that would have otherwise been applicable.

On the contrary, when an insolvency is truly cross-border, practices of forum (and law) shopping could be deemed to be "virtuous", at least if one applies in this field too (215) the same policy in favour of a "normative competition" between the member States that, from the *Centros* judgment onwards, the EU has adopted

(215) As seems to be already possible within the federal system of the U.S.: cf. Rasmussen, Debtor's Choice: A Menu Approach to Corporate Bankruptcy, in Texas Law Rev., 1992, p. 51 ff.

in the neighbouring fields of company law (216) and of the law of financial markets (217). In fact, if insolvencies are seen as an instrument for releasing resources otherwise trapped in a failing enterprise and for achieving higher degrees of overall efficiency in the market (218) (of course, within the limits imposed by the need to protect weak parties for reason of social justice), it is then not at all strange, in the context of a free market-oriented political system such as the EU, that market forces are granted the right to make normative arbitrages among all potentially applicable insolvency laws and insolvency institutions. The party, whether it is a creditor or the debtor itself, that makes a rational choice by selecting the forum and the law best placed to satisfy its interests will be “prized”, while the party that makes an irrational choice, or that is not quick enough to start an insolvency procedure and to gain thereby the privilege of selecting the competent legal system, will be “penalized”, so that, at the end, those who are more successful in exploiting the variety of concurring laws and jurisdictions shall get a competitive advantage, and, *ceteris paribus*, shall prevail.

In this respect it should be considered that, as a result of the decision of the EU legislator to safeguard the member States’ autonomy in this field, their legal systems can still significantly differ on important aspects, e.g., and inter alia: (i) the “characterization” of liability actions against directors/shareholders (for breach of their fiduciary duties, or for acting when they have a conflict of interests, or for wrongful trading, or for preferential treatment of certain creditors, etc.) alternatively as a matter of *lex concursus*, of *lex societatis* or of *lex contractus/lex delicti*; (ii) the *vis attractiva* before the insolvency forum of all related set aside actions, or, alternatively, the allocation of international jurisdiction over such actions on the basis of the general jurisdictional criteria set out by the forum’s private international law (219); (iii) the grant of liens or other privileges in favour of “weak” creditors; (iv) the procedural efficiency of bankruptcy courts; (v) the opening of an insolvency procedure of a company belonging to the same group as the debtor and/or the consolidation of these procedures.

(216) Cf. M.V. Benedettelli, Responsibility of Corporate and Supervisory Bodies within the European “Market of Company Laws”: Issues of Conflicts of Jurisdictions and of Conflicts of Laws, in *Zeit. Schweizerisches Recht*, 2005, p. 486.

(217) Cf. M.V. Benedettelli, Offerte pubbliche d’acquisto e concorrenza tra ordinamenti nel sistema comunitario, in *Banca, borsa*, 2007, p. 565.

(218) Cf. Recital 8 of Regulation n. 1346/2000, which stresses that one of the aims is that of “improving the efficiency and effectiveness of insolvency proceedings having cross border effects”.

(219) As already argued in M.V. Benedettelli, “Centro degli interessi principali”, cit., at p. 526 f., the fact that art. 25(1) of Regulation n. 1346/2000 does not provide uniform jurisdictional criteria with respect to set aside actions does not mean that this delicate issue is left unattended, with the consequent risk of conflicts of jurisdictions: rather, it only means that the Regulation leaves to the member State of the *lex concursus* to decide whether to apply the *vis attractiva* principle by concentrating all such actions before its courts or to apply other jurisdictional criteria (which might also acknowledge the jurisdiction of foreign courts), provided that all other member States shall have to recognize judgments issued by the courts so identified. It is submitted that this interpretation of art. 25(1) is consistent with the holding of the European Court of Justice in the Deko Marty case (Judgment 2 February 2009 in case C-339/07, Christopher Seagon v. Deko Marty Belgium, in www.curia.europa.eu), particularly at §§ 27-28.

To trigger the jurisdiction of one or the other insolvency court, and thereby the application of one or the other insolvency law, can then have a significant impact on the interests of the debtor, of its creditors, of its employees and of any other party whose interests are affected by a debtor's distress.

9. The insolvency of cross-border groups of companies

The suggested interpretation of Regulation n. 1346/2000 as a private international law instrument inspired by the "jurisdictional approach", with the consequent focus on the content of the applicable *lex concursus*, may also have an impact on the debated issue of the insolvency of cross-border groups of companies.

Of course, there can be no doubt that the EU legislator has chosen an "atomized" approach, so that each debtor, irrespective of whether it belongs to a distressed group of companies, is subject to separate and autonomous insolvency proceedings.

However, the *lex concursus* of a member State could consider the relationships that a debtor has with other companies of its group a relevant factor for regulating the debtor's insolvency. In particular, a *lex concursus* which sets out a special procedure for group insolvencies could provide that a debtor which has its registered office in another member State is deemed to have its COMI where the registered office of its holding company is situated, and could also provide that principal proceedings relating to the insolvency of the debtor, of its holding company and of other companies of the group, will have to be opened in the same jurisdiction, and, while separate (as required by Regulation n. 1346/00), will have to be carried out in a coordinated way.

By way of example, both art. 80 ff. of Italian Legislative Decree 8 July 1999, n. 270 on the "*amministrazione straordinaria delle grandi imprese in stato di insolvenza*" - whereby the restructuring procedure applicable to large companies can be extended to other insolvent companies of the same group even if they do not satisfy the dimensional requirements necessary to benefit from this special regime - and art. 3, par. 3 bis of Italian Law Decree 22 December 2003, n. 347 containing "*misure urgenti per la ristrutturazione industriale di grandi imprese in stato di insolvenza*" - whereby the *commissario straordinario* in charge of the restructuring may consolidate the procedures relating to the group companies or carry them out in an autonomous way – once interpreted in light of Regulation n. 1346/2000, could also be applied to companies incorporated under a law other than Italian law to the extent the abovementioned requirements of the Italian *lex concursus* are satisfied.

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Legislative Guide on Insolvency Law

Part three: Treatment of enterprise groups in insolvency

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Part three

Treatment of enterprise groups in insolvency

Introduction

1. Part three focuses on the treatment of enterprise groups in insolvency. Where an approach different to that taken in part two might be required with respect to a particular issue as it affects an enterprise group or where the treatment of enterprise groups in insolvency raises issues additional to those discussed in part two, they are addressed in this part. Where the treatment of an issue in the context of an enterprise group is the same as discussed above, it is not repeated in this part. The substance of part two is therefore applicable to enterprise groups unless indicated otherwise in this part.

2. Chapter I addresses general features of enterprise groups. Chapter II deals with the insolvency of group members in a domestic context and proposes a number of recommendations to supplement the recommendations of part two, in so far as additional issues arise by virtue of the group context. Chapter III addresses the cross-border insolvency of enterprise groups, building upon the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law), which is relevant to cross-border insolvency proceedings with respect to an individual group member, but does not address issues pertinent to the insolvency of different group members in different States and upon the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the UNCITRAL Practice Guide).

Purpose of part three

3. The purpose of this part is to permit, in both domestic and cross-border contexts, treatment of the insolvency proceedings of one or more enterprise group members within the context of the enterprise group to address the issues particular to insolvency proceedings involving those groups and to achieve a better, more effective result for the enterprise group as a whole and its creditors and, in particular:

- (a) To promote the key objectives of recommendation 1; and
- (b) To more effectively address, in the context of recommendation 5, instances of cross-border insolvency proceedings involving enterprise group members.

Glossary

4. The following additional terms relate specifically to enterprise groups and should be read in conjunction with the terms and explanations included in the main glossary above.

- (a) “Enterprise group”: two or more enterprises that are interconnected by control or significant ownership;

(b) “Enterprise”: any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;¹

(c) “Control”: the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

(d) “Procedural coordination”: coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct;²

(e) “Substantive consolidation”: the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate.³

¹ Consistent with the approach adopted with respect to individual debtors, the focus of this part is upon the conduct of economic activities by entities that would conform to the types of entities described as an “enterprise”. It is not intended to include consumers or other entities of a specialized nature (e.g. banks and insurance companies) that would not be governed by insolvency law pursuant to recommendations 8 and 9 (see above, footnote 6 to recommendation 9). The special considerations arising from the insolvency of such debtors are not specifically addressed above, part two, chap. I, paras. 1-11.

² The concept of procedural coordination is explained in detail in the commentary, see below chap. II, paras. 22-25.

³ For the effects of substantive consolidation and the treatment of security interests, see below, recommendations 224 to 225 and the commentary at chap. II, paras. 129-133.

I. General features of enterprise groups

A. Introduction

1. Most jurisdictions recognize the legal concept of “corporation”, an entity which has a legal personality separate from the individuals comprising it, whether as owners, managers, or employees. As a legal or juristic person, a corporation is capable of enjoying and being subject to certain legal rights, duties and liabilities, such as the capacity to sue and be sued, to hold and transfer property, to sign contracts and to pay taxes. The corporation also enjoys the characteristic of perpetuity, in the sense that its existence continues, independent of its members at any given time and over time, and shareholders can transfer their shares without affecting the entity’s corporate existence. Corporations may also have limited liability, whereby investors will only be liable for the amount they have intentionally put at risk in the enterprise, providing certainty and encouraging investment; without that limitation, investors would put their entire assets at risk for every business venture they entered into. A corporation depends on a legal process to obtain its legal personality and once formed, will be subject to the regulatory regime applying to entities so formed. That law generally will determine not only the requirements for formation, but also the consequences of formation, such as the powers and capacities of the company, the rights and duties of its members and the extent to which members may be liable for the company’s debts. The corporate form can thus be seen as promoting certainty in the ordering of business affairs, as those dealing with a corporation know that they can rely upon its legal personality and the rights, duties and obligations that attach to it.

2. The business of corporations is increasingly conducted, both domestically and internationally, through “enterprise groups”. The term “enterprise group” covers different forms of economic organization based upon the single entity and for a working definition may be loosely described as two or more legal entities (group members) that are linked together by some form of control (whether direct or indirect) or ownership (see below). The size and complexity of enterprise groups may not always be readily apparent, as the public image of many is that of a unitary organization operating under a single corporate identity.

3. Enterprise groups have been in existence for some time, emerging in some countries, according to commentators, at the end of the 19th and beginning of the 20th centuries through a process of internal expansion, which involved companies taking control of their own financial, technical or commercial capacities. These single entity enterprises then expanded externally to take legal or economic control of other corporations. Initially these other corporations may have been in the same market, but eventually the expansion encompassed corporations working in related fields and later in fields that were different or unrelated, whether by reference to a product or geographical location or both. One of the factors supporting this expansion, at least in some jurisdictions, was the legitimatization of ownership of the shares of one corporation by another corporation, a phenomenon originally prohibited in both common law and civil law systems.

4. Throughout this expansion, corporations retained and continue to retain, their separate legal personality even though individual corporations are now probably the

typical form of organization only for small private businesses. Enterprise groups are ubiquitous in both emerging and developed markets, with a common characteristic of operations across a large number of sometimes unrelated industries, often with family ownership in combination with varying degrees of participation by outside investors. The largest economic entities in the world include not only States, but also equal numbers of multinational enterprise groups. Major multinational groups may be responsible for significant percentages of Gross National Product worldwide and have annual growth rates and turnovers that exceed those of many States.

5. Despite the reality of the enterprise group, however, much of the legislation relating to corporations and particularly to their treatment in insolvency, deals with the single corporate entity. Despite the absence of legislation, judges and insolvency representatives in many countries, faced with issues that may better be addressed by reference to a single enterprise rather than a single corporate entity,⁴ have developed solutions to achieve results that more accurately reflect the economic reality of modern business.

B. Nature of enterprise groups

6. Enterprise group structures may be simple or highly complex, involving numbers of wholly or partly owned subsidiaries, operating subsidiaries, sub-subsidiaries, sub-holding companies, service companies, dormant companies, cross directorships, equity ownership and so forth. They may also involve other types of entity, such as special purpose entities (SPE),⁵ joint ventures,⁶ offshore trusts,⁷ income trusts⁸ and partnerships.

⁴ The distinction is discussed further below, see chap. I, paras. 31-39.

⁵ Special purpose entities (SPE, also known as a “special purpose vehicle” or “bankruptcy-remote entity”) are created to fulfil narrow or temporary objectives, such as the acquisition and financing of specific assets, primarily to isolate financial risk or enhance tax efficiency. An SPE is typically a subsidiary owned almost entirely by the parent corporation; certain jurisdictions require that another investor own at least 3 per cent. Its asset and liability structure and legal status generally makes its obligations secure even if the parent becomes insolvent. The corporation establishing the SPE can accomplish its purpose without having to carry any of the associated assets or liabilities on its own balance sheet, thus they are “off-balance sheet.” SPEs may also be used for competitive reasons to ensure intellectual property, such as for the development of new technology, is owned by a separate entity that is not affected by pre-existing licence agreements.

⁶ A joint venture is often a contractual arrangement or partnership between two or more parties to pursue a joint business purpose. Such an arrangement may sometimes result in the formation of one or more legal entities that may involve both parties contributing equity, and sharing in the revenues, expenses, and control of the enterprise. The venture could be for one specific project only, or a continuing business relationship. Joint ventures are widely used in an international context, as some countries require foreign corporations to form joint ventures with a domestic partner in order to enter a market. This requirement often results in technology and managerial control being transferred to the domestic partner. Forming a joint venture might assist in spreading costs and risks; improving access to financial resources; providing economies of scale and advantages of size; and facilitating access to new technologies and customers or to innovative managerial practices. It may also serve competitive and strategic goals such as influencing structural evolution of an industry; pre-empting competition; creating stronger competitive units; and facilitating transfer of technology and skills, as well as diversification.

⁷ An offshore trust is a conventional trust that is formed under the laws of an offshore

7. Enterprise groups may have a hierarchical or vertical structure, with succeeding layers of parent and controlled companies, which may be subsidiaries or other types of affiliated or related companies, operating at different points in a production or distribution process. Vertical integration generally takes place within a single industry and combines, for example, some or all of the sequential operations between the sourcing of raw materials and sale of the final product. It can be pursued as a strategy by acquiring suppliers, wholesalers, and retailers to increase control and reliability. It can also be achieved when a company gains strong control over suppliers or distributors, usually by exercising purchasing power. One example of vertical integration that is often cited is the oil industry, where the large oil groups conduct exploration and crude recovery, transport and refining, and retail distribution and sale of fuel.

8. Enterprise groups may also have a horizontal structure, with many sibling group members, often with a high degree of cross-ownership, operating at the same level in a particular process, for example in book publishing, where one publisher might acquire others in order to increase its range of editors and authors or to otherwise enhance its competitiveness or the media industry, where one group may own multiple media outlets running the same or very similar content. Horizontal integration is generally associated with control of a single stage of production or a single industry, enabling the group to take advantage of economies of scale, but horizontally integrated groups may also conduct businesses in a related field or in a diverse range of unrelated fields. It has been suggested that horizontal groups are more common in some parts of the world, such as Europe, while vertical groups are more common in others, such as the USA and Japan. Additionally, vertical integration might be more common in manufacturing, while horizontal integration is more common in marketing.

9. The research literature on enterprise groups clearly shows that they can be based on different types of alliances such as bank relationships, interlocking board directorates, owner alliances, information sharing, joint ventures, and cartels. The research also shows that enterprise group structures vary across corporate governance systems. In some States, they may be organized either vertically or horizontally and develop across industries. In some cases, the parent may be an unincorporated entity, such as a foundation or other form of non-profit organization. They generally include a bank, a parent or holding company⁹ (referred to as “parent

jurisdiction. They are similar in nature and effect to onshore trusts, involving a transfer of assets to a trustee to manage for the benefit of a person or class of persons. Offshore trusts may be formed for tax purposes or asset protection. In practice the effectiveness of such trusts may be limited if the insolvency law of the home jurisdiction of the person transferring the assets operates to set aside transfers to the trusts, and transactions entered into to defraud creditors. An income trust is an investment trust holding income-producing assets. It may also refer to a legal entity, capital structure and ownership vehicle for certain assets or businesses. Its shares or trust units are traded on securities exchanges and income is passed on to the investors or unit holders, through monthly or quarterly distributions.

⁸ An income trust is an investment trust holding income-producing assets. It may also refer to a legal entity, capital structure and ownership vehicle for certain assets or businesses. Its shares or trust units are traded on securities exchanges and income is passed on to the investors or unit holders, through monthly or quarterly distributions.

⁹ A holding or parent company or entity that directly or indirectly controls enough voting stock in another firm to determine financial and operational policies. The term may signify a company that does not produce goods or services itself, but whose purpose is to own shares of other

company”) or a trading company, and a diverse group of manufacturing firms. In contrast, in other States such groups are typically controlled by a single family or a small number of families and are uniformly vertically organized or have strong ties to the State, but not to particular families. Degrees of diversification also vary considerably, with some groups involving significant intra-group trading and others not.¹⁰

10. The degree of financial and decision-making autonomy in enterprise groups can vary considerably. In some groups, members may be active trading entities, with primary responsibility for their own business goals, activities and finances. In others, strategic and budgetary decisions may be centralized, with group members operating as divisions of a larger business and exercising little independent discretion within the cohesive economic unit. A parent company may exercise close control by allocating equity and loan capital to group members through a central group finance operation, deciding their operational and financial policies, setting performance targets, selecting directors and other key personnel, and continuously monitoring their activities. The power of the group may be centralized in the ultimate parent company or in a company further down the group chain, with the parent company owning the key group shares, but not having any direct productive or managerial role. The largest groups might have their own banks and perform the principal functions of a capital market. Group financing might involve intra-group lending between the parent company and subsidiaries, involving loans both from and to the parent company and the granting of cross-guarantees.¹¹ Intra-group lending might be working capital or unpaid short-term debt, such as unpaid dividends or credit in respect of intra-group trading; they may or may not involve the payment of interest.

11. In some States, family ties play an important connecting factor in enterprise groups. It may be the case, for example, that the more important family members and close associates of family members will sit on the board of the parent company of a group, with members of that board spread around the boards of group members so that there is a web of interlinked common directorships, enabling the family to maintain control over the group. For example, the chart of a large group in India

companies (or own other companies outright).

¹⁰ Some research suggests that groups in Chile, for example, are more diverse than groups in South Korea, while groups in the Philippines are more vertically integrated than groups in India and far more involved in financial services than groups in Thailand. See T. Khanna and Y. Yafeh, *Business Groups in Emerging Markets: Paragons or Parasites?* *Journal of Economic Literature*, Vol. XLV (June 2007) pp. 331-372.

¹¹ In many countries a significant method of enterprise group capital raising is cross-guarantee financing, where each company within a group guarantees the performance of the others. Implementing cross-guarantee claims in liquidation has proved difficult in some jurisdictions and they have sometimes been set aside. In one jurisdiction, cross-guarantees may operate to reduce the regulatory burden on companies by bestowing accounting and auditing relief on companies that are party to the arrangement. The deed of cross-guarantee makes the group of companies that are party to that deed akin to a single legal entity in many respects and operates as a form of voluntary contribution or pooling in the event that one or more of the companies party to the deed goes into liquidation while the cross-guarantee is still operative. One advantage of this arrangement is that creditors and potential creditors can focus on the consolidated position for those entities, rather than on the individual financial statements of the wholly owned subsidiaries that are party to the deed.

shows a complex web of shared directorships between the board of the parent company and 45 other group members.¹²

12. In some countries, enterprise groups have enjoyed close ties to governments and government policies, such as those affecting access to credit and foreign currency and competition, which have significantly influenced the development of groups. Equally, there are examples where government policies have targeted the operations of enterprise groups, removing certain types of preferential treatment, such as access to capital.

13. The structure of many enterprise groups shows the dimension and potential complexity of the arrangements. They may involve many layers of different companies controlled to a greater or lesser extent by the level or levels above,¹³ in some cases involving hundreds if not thousands of different companies.

14. A study based upon the 1979 accounts and reports of a number of large British-based multinationals, for example, had to be abandoned with respect to two of the largest groups, with 1,200 and 800 subsidiaries respectively, because of the impossibility of completing the task. Researchers noted that few people inside the group could have had a clear understanding of the precise legal relationships between all group members and that none of the groups studied appeared to have its own complete chart.¹⁴ Similarly, the group charts of several Hong Kong property groups such as Carrian, which failed over 20 years ago, ran to several pages and a reader would have needed a good magnifying glass to identify the subsidiaries. The group chart of the Federal Mogul group, an automotive component supplier, when blown up to the point where you can read the names of all the subsidiaries, fills a wall of a small office. The group chart of Collins and Aikman, another automotive group, is printed in a book, with sub-sub-groups having the complexity of structure of many domestic enterprise groups.

15. The degree of integration of a group might be determined by reference to a number of factors, which might include the economic organization of the group (e.g., whether the administrative structure is arranged centrally or maintains the independence of the various members, whether subsidiaries depend on the enterprise group for financing or loan guarantees, whether personnel matters are handled centrally, the extent to which the parent makes key decisions on policy, operations and budget and the extent to which the businesses of the group are integrated vertically or horizontally); how the group manages its marketing (e.g., the importance of intra-group sales and purchases, the use of common trademarks, logos and advertising programmes and the provision of guarantees for the products); and the public image of the group (e.g., the extent to which the group presents itself

¹² See Khanna and Yafeh, note 10.

¹³ A 1997 survey in Australia of the Top 500 listed companies showed that 89 per cent of those companies controlled other companies; the greater the market capitalization of a listed company, the more companies it was likely to control (this ranged from an average of 72 controlled companies for those companies with the largest market capitalization to an average of 9 for the smallest); 90 per cent of controlled companies were wholly owned; the number of vertical subsidiary levels in an enterprise group ranged from 1 to 11, with an overall average of 3 to 4. In other countries the figures are much larger. Cited in Companies and Securities Advisory Committee (CASAC), Corporate Groups Final Report, 2000 (Australia), paragraph 1.2.

¹⁴ Hadden, *Inside Corporate Groups*, 1984 *International Journal of Sociology of Law*, 12, pp. 271-286, at 273.

as a single enterprise and the extent to which the activities of the constituent companies are described as operations of the group in external reports, such as those for shareholders, regulators and investors).

16. The legal structure of a group as a number of separate legal entities is not necessarily determinative of how the business of the group is managed. While each group member is a separate entity, management may be arranged in divisions along product lines and subsidiaries may have one or many product lines with the result that they fall across different divisions. In some cases, management may treat wholly owned subsidiaries as if they were branches of the parent company.

C. Reasons for conducting business through enterprise groups

17. Diverse factors shape the formation, operation and evolution of enterprise groups, ranging from legal and economic factors to societal, cultural, institutional and other norms. State leadership, inheritance customs, kinship structures (including inter-generational considerations), ethnicity and national ideology, as well as the level of development of the legal (e.g., effectiveness of contract enforcement) and institutional framework supporting commercial activity may influence enterprise groups in different environments. Some studies suggest that group structures can make up for under-developed institutions, with consequent benefits for transaction costs.

18. The advantages of conducting business through an enterprise group structure may include 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 company. One company may acquire another to expand and increase market power, at the same time preserving the acquired company and continuing to operate it as a separate entity to utilize its corporate name, goodwill and public image. Expansion may occur to acquire new, technical or management skills. Once formed, groups may continue to exist and proliferate because of the administrative costs associated with rationalizing and liquidating redundant subsidiaries.

19. A group structure may enable a group to attract capital to only part of its business without forfeiting overall control, by incorporating that part of the business as a separate subsidiary and allowing outside investors to acquire a minority shareholding in it. A group structure may enable a group to lower the risk of legal liability by confining high liability risks, such as environmental and consumer liability, to particular group members, thus isolating the remaining group assets from this potential liability. Better security for debt or project financing may be facilitated by moving specific assets into a separate member incorporated for that purpose, thus ensuring that the lender has a first priority over the whole or most of the new member's property. A separate group member may also be formed to undertake a particular project and obtain additional finance by means of charges over its own assets and undertaking or may be required for the purpose of holding a government license or concession. A group structure can simplify the partial sale of a business as it may be easier, and sometimes more tax effective, to transfer the shares of a group member to the purchaser, rather than sell discrete assets. A group

may also be formed incidentally when a company acquires another company, which in turn might be a parent company for various other companies.

20. Meeting regulatory requirements may be easier where the companies subject to those requirements are separate group members. In the case of multinational groups, the domestic law of particular countries in which the group wishes to conduct business may require that local businesses be conducted through separate subsidiaries (sometimes subject to minimum local equity requirements) or impose other requirements or limitations, relating for example to employment and labour regulation. Arrangements not involving equity have been used for foreign expansion because of, for example, local obstacles to equity participation, the level of regulation imposed upon foreign investment operations and the relative cost advantages of those types of arrangement. Another relevant factor for multinational groups may be geographical imperatives, such as the need to acquire raw materials or to market products through a subsidiary established in a particular location. A related consideration of increasing importance that perhaps relates more to where parts of the groups structure are to be located than to the question of whether or not to organize a business through a group structure, is the importance of local law on issues such as the cost and simplicity of incorporation in the first instance, obligations of incorporated entities and treatment of the group in insolvency. Differences in law across jurisdictions can significantly complicate these issues.

21. Other key drivers for complicated group structures include fiscal considerations and their influence on the flow of money within groups. The incidence of tax is often cited as the reason for the formation of and subsequent growth of enterprise groups and many legal systems have traditionally given weight to the economic unity of related entities. While separate taxation of individual entities might be the underlying principle, it may be qualified to fulfil basic purposes such as protecting the revenue interests of governments and alleviating the tax burden that would otherwise result from the separate taxation of each group member.¹⁵ Measures that take into account the connections between parent and subsidiary companies include tax exemptions for intra-group dividends; group relief; and measures aimed at combating tax evasion. Tax exemptions may be available, for example, on the dividends paid by a company to its resident corporate shareholders and for intra-group dividends where companies are linked by substantial ownership. Tax credits may be allowed for the foreign tax paid on the underlying profits of the subsidiary and for the foreign tax that is charged directly on a dividend. Group relief might be available where related companies can be treated as a single fiscal unit and file consolidated accounts. The losses of one subsidiary may be offset against the income of another or profits and losses may be pooled amongst group members.

22. As a result of the importance of fiscal considerations, inter-group pricing policies and national taxation rates and policies often determine the distribution of assets and liabilities within enterprise groups. Differential corporate tax rates across States, as well as certain exceptions (such as reduced tax rates for profits from manufacturing activities or financial services income) applicable in some States may make them more attractive locations than others that have higher tax rates and fewer

¹⁵ International Investment and Multinational Enterprises – Responsibility of parent companies and their subsidiaries, OECD, 1979.

or no exceptions. Nevertheless, tax authorities may have the right to revisit transfer-pricing structures aimed at locating profits in low taxation domiciles.

23. Choices such as between establishing a branch or a subsidiary might also be affected by fiscal regulation where, for example, repatriation of profits from a foreign subsidiary may be effected tax free by loan repayments to a parent company or may be tax free provided the parent owns a specified percentage (ranging from 5-20 per cent) of the foreign company's share capital; interest on funds borrowed to finance the acquisition of a subsidiary can be offset against their profits and as already noted, the profits and losses of different subsidiaries can be offset against each other in a consolidated tax return. Business activities have also been divided between two or more corporations to exploit tax allowances, limits imposed on the amounts of tax allowances or progressive rates of taxation. Other reasons might include: taking advantage of differences in accounting methods, taxable years, depreciation methods, inventory valuation methods and foreign tax credits; segregating activities that if combined in a single taxable entity, might be disadvantageous in fiscal terms; and taking advantage of favourable treatment for certain activities (e.g., anticipated or potential sales, mergers, liquidations or intra-family gifts or bequests) that is available for some operations, but not for others.

24. Accounting requirements also have a role to play in determining the structure of enterprise groups. In some jurisdictions, certain devices such as "agent only" subsidiaries might be created to manage certain aspects of the business and enable the parent company to avoid submitting detailed trading accounts for that subsidiary, which is just an agent of the parent company that owns all of the relevant assets.

25. Many of these benefits of conducting business through an enterprise group may be illusory. Protection against devastating losses may fall away as a result of group financing agreements; intra-group trading; cross-guarantees; and letters of comfort¹⁶ given to group auditors and the inclination of major creditors, and particularly bankers, to ensure that they have the indemnity of the top member in any group. To avoid doubt, group structures are not required from the accounting point of view — accountants are just as happy with consolidating branches as groups of subsidiaries. It seems probable that the banking, commercial and legal sectors often fail to appreciate the accounting aspects of enterprise groups.

D. Defining the "enterprise group" — ownership and control

26. Although the existence of enterprise groups and the importance of relationships between the group members are increasingly acknowledged, both in legislation and court decisions, there is no coherent body of rules that directly governs those relationships in a comprehensive manner. In jurisdictions where there

¹⁶ A letter of comfort is generally provided by a parent company to persuade another entity to enter into a transaction with a subsidiary. It may include various types of undertaking, none of which would amount to a guarantee, which may include an undertaking to maintain its shareholding or other financial commitment to a subsidiary; using its influence to see that the subsidiary meets its obligation under a primary contract; or confirming that it is aware of a contract with the subsidiary, but without any express indication that it will assume any responsibility for the primary obligation.

is legislation that recognizes enterprise groups, it may not specifically deal with the regulation of such groups, by way of commercial or corporate legislation, but rather be contained in legislation on taxation, corporate accounting, competition and mergers or other issues; legislation addressing the treatment of enterprise groups in insolvency is rare. Furthermore, an analysis of legislation that does address aspects of enterprise groups reveals a diversity of approaches to the various issues associated with groups, not only between jurisdictions, but also on a comparison of the different legislation within a single jurisdiction. Thus different tests may apply to what constitutes a group for different purposes, although there may be common elements, and where those tests employ a particular concept, such as “control”, definitions may be broader or narrower, depending upon the purpose of the legislation, as noted above.

27. While much legislation avoids specifically defining the term “enterprise group”, several concepts are common to determining the relationships between companies that will be sufficient to constitute them as an enterprise group for certain specific purposes, such as extending liability, accounting purposes, taxation and so on. These concepts are found both in legislation and in numerous court decisions concerning groups in various countries and generally include aspects of ownership and ability to control or influence, both direct and indirect, although in some examples only direct ownership or ability to control or influence is considered. The choice between the two concepts often reflects a balance between the desirability of certainty, which can be achieved by setting a prescribed level of ownership, and flexibility, which might be better achieved by referring to the ability to control or influence and acknowledging the diverse economic realities of enterprise groups.

28. Some examples consider ownership by reference to a formal relationship between the companies, such as what constitutes a parent-subsidary relationship. This may be determined by reference to a formal standard, such as the holding, whether directly or indirectly, of a specified percentage of capital or votes. Examples of those percentages vary from as little as 5 per cent to more than 80 per cent. Those laws specifying lower percentages generally consider additional factors such as the ones discussed below as indicators of control or influence. In some examples, the percentages may establish a rebuttable presumption as to ownership, while higher percentages may establish a conclusive presumption.

29. Other examples of what constitutes an enterprise group adopt a more functional approach and focus on aspects of control, or controlling or decisive influence (referred to as “control”), where “control” is often a defined term. The key elements of control include actual control or capacity to control, either directly or indirectly, financial and operating policy and decision-making. Where the definition includes capacity to control, it generally envisages a passive potential for control, rather than focusing upon control that is actively exercised. Control may be obtained by ownership of assets, or through rights or contracts that give the controlling party the capacity to control. What is important is not so much the strict legal form of the relationship, such as parent-subsidary, between the entities, but rather the substance of that relationship.

30. Factors that might indicate the existence of control of one entity by another could include: the ability to dominate the composition of the board of directors or governing body of the second entity; the ability to appoint or remove all or a

majority of the directors or governing members of the second entity; the ability to control the majority of the votes cast at a meeting of the board or governing body of the second entity; and the ability to cast or regulate the casting of, a majority of the votes that are likely to be cast at a general meeting of the second entity, irrespective of whether that capacity arises through shares or options. Information that may be relevant to consideration of these factors might include: the group member's incorporation documents; details about the member's shareholding; information relating to substantive strategic decisions of the member; internal and external management agreements; details of bank accounts and their administration and authorized signatories; and information relating to employees.

E. Regulation of enterprise groups

31. Regulation of enterprise groups is generally based on one of two approaches or in some cases on a combination of the two: the separate entity approach (which is the traditional approach and by far the most prevalent) and the single enterprise approach.

32. The separate entity approach relies on several basic principles, foremost of which is the separate legal personality of each group company. It is also based upon the limited liability of shareholders of each group company and the duties of directors of each separate group entity to that entity.

33. The separate legal personality of a corporation generally means that it has its own rights and duties, irrespective of who controls it or owns it (i.e., whether it is wholly or partly owned by another company) or its participation in the activities of the enterprise group. The debts it incurs are its debts and the assets of the group generally cannot be pooled¹⁷ to pay for these debts. Contracts entered into with external persons do not automatically involve the parent company or other group members. A parent company cannot take into account the undistributed profits of other group companies in determining its own profits. Limited liability of a corporation means that unlike in a partnership or sole proprietorship, enterprise group members generally have no liability for the group's debts and obligations, with the result that potential losses cannot exceed the amount contributed to the group member by purchasing shares.

34. The single enterprise approach, in comparison, relies upon the economic integration of enterprise group members, treating the group as a single economic unit that operates to further the interests of the group as a whole, or of the dominant group member, rather than of individual members. Borrowing may be conducted on a group basis, with group treasury arrangements being used to offset the credit and debit balances of each group member; group members may be permitted to operate at a loss, or be undercapitalized, as part of the overall group financial structure and strategy; assets and liabilities may be moved between group members in various ways; and intra-group loans, guarantees or other financial arrangements may be entered into on essentially preferential terms.

35. While many countries follow the separate entity approach, there are some countries that recognize exceptions to strict application of that approach and others

¹⁷ See part three, chap. II, paras. 105-137 for a discussion of substantive consolidation.

that have developed, either by legislation or the courts, a single enterprise approach that applies to certain situations.

36. Some of the circumstances in which strict application of the separate entity approach has been overridden may include: consolidation of enterprise group accounts for a company and any controlled entity; related person transactions (where a company is otherwise prohibited from giving any financial benefit, including intra-group loans, guarantees, indemnities, releases of debt or asset transfers, to a related company unless that transaction is approved by shareholders or is otherwise exempt); cross-shareholding (where group members are generally prohibited from acquiring, or taking a security over, the shares of any controlling member or issuing or transferring their shares to any controlled member); and insolvent trading (where a parent company which ought to suspect the insolvency of a subsidiary can be made liable for the debts of that subsidiary incurred when it was insolvent).

37. A few countries have established various categories of enterprise groups that can operate as a single enterprise, in exchange for enhanced protection of creditors and minority shareholders. In one,¹⁸ enterprise group structures involving public companies are divided into three categories: (a) integrated groups; (b) contract groups; and (c) de facto groups, to which a set of harmonized single enterprise principles dealing with corporate governance and liability applies:

(a) Integrated groups are based upon a vote, by a specified proportion of shareholders of the parent company, which in turn owns a specified proportion of the shares of the subsidiary, to approve the complete integration of the subsidiary. The parent company will have unlimited power to direct the subsidiary, in return for the parent company being jointly and severally liable for the debts and obligations of the subsidiary;

(b) Contract groups can be formed by a specified proportion of shareholders of each of two companies entering into a contract that grants one company (the parent) the right to direct the other company, provided the directions are consistent with the interests of the parent company or the group as a whole. In return for giving the parent company the right of control, minority shareholders and creditors are given enhanced protection; and

(c) De facto groups are those where one company exercises, either directly or indirectly, a dominant influence over another company. Although not created by any formal arrangement, there must nevertheless be systematic involvement by the parent in the affairs of the controlled company.

38. In one country¹⁹ where single enterprise principles have been introduced into corporate legislation, directors of wholly or partly owned subsidiaries may act in the interests of the parent company rather than their subsidiary company; there are provisions for streamlined group mergers; and legislation also permits contribution and substantive consolidation or pooling orders.

¹⁸ Germany.

¹⁹ New Zealand.

39. In another country,²⁰ commercial regulatory laws affecting enterprise groups increasingly use single enterprise principles to ensure that the policy underlying specific commercial legislation cannot be undermined or avoided by the use of enterprise groups. The courts have assisted in this development, selectively introducing the single enterprise concept to achieve the underlying policies of the legislation. The concept has been applied to insolvency law to avoid specified intra-group transactions, to support intra-group guarantees and in limited cases, to achieve substantive consolidation. The courts also have the power to alter the priority of claims in the liquidation of a group entity, either by treating some intra-group loans to that entity as equity rather than debt, or by subordinating intra-group loans to that entity to the claims of its external creditors.

²⁰ USA.

II. Addressing the insolvency of enterprise groups: Domestic issues

A. Introduction

1. Enterprise groups may be structured in ways that minimize the threat of insolvency to one or more group members, by entering into cross-guarantees, indemnities and similar types of arrangements. Where problems do arise, a parent or controlling group member may seek to avoid the insolvency of other group members in order to preserve its reputation and maintain its credit in commercial and financial spheres by providing additional finance and agreeing to subordinate intra-group claims to external liabilities.

2. However, if the complexity of an enterprise group's structure is disturbed by the onset of financial difficulty affecting one or more, or even all of the group members that leads to insolvency, problems arise simply because the group is constituted by members that are each recognized as having a separate legal personality and existence. Since, as noted above, the great majority of domestic insolvency and corporate laws do not address the insolvency of enterprise groups, even though group issues might be addressed outside the insolvency area in relation to accounting treatment, regulatory issues and taxation, the absence of legislative authority to the contrary or judicial discretion to intervene in insolvency means that each entity has to be separately considered and, if necessary, separately administered in insolvency. In certain situations, such as where the business activity of group members is closely integrated, that approach may not always achieve the best result for the individual debtor or for the business of the group as a whole, unless the parallel insolvency proceedings concerning all group members can be closely coordinated.

3. Much of what already exists in domestic law regarding the insolvency of enterprise groups concentrates on the circumstances in which it might be appropriate to consolidate insolvency estates. What is lacking is guidance on how the insolvency of enterprise groups should be addressed more comprehensively and, in particular, whether and in what circumstances enterprise groups should be treated differently from a single corporate entity.

4. A second key issue with respect to the treatment of enterprise groups in insolvency is the degree to which the group is economically and organizationally integrated and how that level of integration might affect treatment of the group in insolvency and in particular, the extent to which a highly integrated group should be treated differently to a group where individual members retain a high degree of independence. In some cases, where for example the structure of a group is diverse, involving unrelated businesses and assets, the insolvency of one or more group members may not affect other members or the group as a whole and the insolvent members can be administered separately. In other cases, however, the insolvency of one group member may cause financial distress in other members or in the group as a whole, because of the group's integrated structure, with a high degree of interdependence and linked assets and debts between its different parts. In those circumstances, it might often be the case that the insolvency of one or more group members would lead inevitably to the insolvency of all members (the "domino

effect”) and there may be some advantage in judging the imminence of the insolvency by reference to the group situation as a whole or coordinating that consideration with respect to multiple members.

B. Application and commencement

5. General considerations with respect to application for and commencement of insolvency proceedings are discussed above in part two, chapters I and II. Since those chapters apply equally to individual enterprise group members, they should be considered in conjunction with the additional issues specific to enterprise groups discussed below.

1. Joint application for commencement

(a) Background

6. As a general rule, insolvency laws respect the separate legal status of each enterprise group member and a separate application for commencement of insolvency proceedings is required to be made with respect to each of those members. Moreover, each of those members must be covered by the insolvency law (see recommendation 10) and satisfy the standard for commencement of insolvency proceedings (see recommendations 15 and 16). Some laws make provision for limited exceptions that allow a single application to be extended to other group members where, for example, all interested parties consent to the inclusion of more than one group member; the insolvency of one group member has the potential to affect other group members; the parties to the application are closely economically integrated, such as by intermingling of assets or a specified degree of control or ownership; or consideration of the group as a single entity has special legal relevance, especially in the context of reorganization plans.

7. The recommendations above concerning application for and commencement of insolvency proceedings apply to debtors that are enterprise group members in the same manner as they apply to debtors that are individual commercial enterprises. Recommendations 15 and 16 establish the standards for debtor and creditor applications for commencement of insolvency proceedings and form the basis upon which an application could be made for each group member that satisfied those standards.²¹ In the enterprise group context, the insolvency of a parent or controlling group member may affect the financial stability of a subsidiary or controlled member or the insolvency of a number of such members might adversely affect the solvency of others, so that insolvency is imminent across the group. That situation is covered by the terms of recommendation 15 if, at the time of applications by the insolvent group members, it could be said of the other group members that they are or will be generally unable to pay their debts as they mature.

(b) Purpose of a joint application

8. Permitting group members that satisfy the commencement standard to make a joint application for commencement of insolvency proceedings has the potential to improve efficiency and reduce costs by facilitating the coordinated consideration of

²¹ In the case of an application by a debtor, recommendation 15 includes imminent insolvency.

those applications by the court, without affecting the separate identity of each of those group members or removing the need for each to individually satisfy the applicable commencement standard. It would also alert the court to the existence of a group, particularly if the application was accompanied by information substantiating the existence of the group and the relationship between the relevant group members and, where proceedings subsequently commenced on the basis of that joint application, would have the advantage of establishing a common commencement date for each insolvent group member. This common date could simplify compliance with time deadlines and the calculation of the suspect period for avoidance purposes.

9. Such a joint application might include, where permitted under the law and feasible in the circumstances, a single application covering all group members that satisfy the commencement standard or parallel applications made at the same time in respect of each of those members. The latter approach may be appropriate where the group members are not located in the same domestic jurisdiction and different courts have competence (as discussed below, paras. 17-20) or where other circumstances of the case, such as that there is a significant number of proceedings to be coordinated, suggest that a single application would not be practical. In both cases, it is desirable that the insolvency law facilitate the court undertaking a coordinated consideration of whether the commencement standards with respect to the individual group members are satisfied, taking into account the group context where relevant.

(c) Joint application and procedural coordination distinguished

10. The making of a joint application for commencement of insolvency proceedings should be distinguished from an application for what is referred to below as procedural coordination. The purpose of permitting a joint application is to facilitate coordination of commencement considerations and potentially reduce costs. Commencement of multiple proceedings on the basis of a joint application should also facilitate coordination of those proceedings; the commencement date, and any other dates calculated by reference to that date, such as those relating to the suspect period, would be the same for each member. Permitting a joint application is not intended to predetermine, if the proceedings commence, how they would be administered and, in particular, whether they would be subject to procedural coordination. It is desirable, therefore, that an insolvency law does not establish a joint application as a prerequisite for procedural coordination. Nevertheless, a joint application for commencement might include an application for procedural coordination, as noted below, and might facilitate the court taking a decision on procedural coordination.

(d) Including a solvent group member in a joint application

11. A question that is often discussed in the group context is whether a solvent group member can be included in an application for commencement of insolvency proceedings with respect to insolvent group members and if so, in what circumstances. Where a group member appears to be solvent, but further investigation shows insolvency to be imminent, inclusion of that member in the application would be covered by recommendation 15, as noted above.

12. Where the question is not one of imminent insolvency and the group member is clearly solvent, different approaches may be taken. Where a group is closely integrated, an insolvency law may permit an application for commencement to include group members that do not satisfy the commencement standard, on the basis that it is desirable in the interests of the group as a whole that those members be included in the proceedings. Factors relevant to determining whether the necessary degree of integration exists might include: the relationship between the group members that is variously described, but involves, for example, a significant degree of interdependence or control; intermingling of assets; unity of identity, reliance on management and financial support or other similar factors that need not necessarily arise from the legal relationship (such as parent-subsidiary) between the group members. A further situation in which including a solvent group member in a joint application might be appropriate is where the existence of the “group” is fictitious. This might occur where, for example, the activities of the group are conducted as if they relate to a single entity and the existence of the group is a mere front for the activities of that single entity. It may also occur where members are so interlinked that there is really only one asset base and the legal separation between group members is not maintained, with management and creditors treating the different entities as if they were one and the same.

13. Such an approach may facilitate development of an insolvency solution for the whole group, avoiding piecemeal commencement of proceedings over time, if and when additional group members become affected by the insolvency proceedings initiated against the originally insolvent members. It could also facilitate the preparation of a comprehensive reorganization plan, covering the assets of both solvent and insolvent group members.

14. One of the problems with including a solvent group member, however, is that the insolvency law will generally only cover those entities properly regarded as satisfying the standard for commencement of insolvency proceedings. A solvent group member may, however, be voluntarily covered by a reorganization plan, where a commercial decision is taken by the board of directors or the management of that member (in accordance with applicable law) that it should participate in the plan (see below, para. 152).

15. A joint application for commencement might also be permitted under some insolvency laws where all interested group members consent to the inclusion of one or more other members, whether they are insolvent or not, or all parties in interest, including creditors, so consent. It would generally be the case, however, that obtaining the consent of all creditors in such circumstances could prove to be very difficult and potentially time-consuming. An insolvency law might also consider whether a group member not involved at the time of commencement of insolvency proceedings with respect to other group members might later be joined in those proceedings if it is subsequently adversely affected by those proceedings or it is determined that its joinder would be in the interests of the group as a whole.

(e) Persons permitted to make a joint application

16. Consistent with the approach of recommendation 14, an insolvency law may permit a joint application to be made by two or more enterprise group members that satisfy the commencement standard of the insolvency law (see part two, chap. I, paras. 32-53). An application might also be made by a creditor with respect to any

of the group members of which it is a creditor. Permitting a creditor to make an application with respect to group members of which it is not a creditor would be inconsistent with the commencement standard of recommendation 14.

(f) Competent courts

17. A joint application for commencement with respect to two or more enterprise group members may raise issues of jurisdiction, even in the domestic context, if those group members are located in different places and different courts potentially have jurisdiction over those individual group members and therefore competence to consider the application. This may occur, for example, in respect of a group operating nationally in States where jurisdiction for insolvency matters lies with courts in different places or applications for commencement may be made in different courts. Some laws may allow a joint application for commencement to be handled by a single court that will have jurisdiction over the individual group members included in the application.

18. Although that approach is desirable, it will ultimately be a question of whether domestic law permits joint applications involving different debtors (albeit members of the same group) in different jurisdictions or courts to be treated in such a way. In some States, proceedings in different courts may be transferred to or consolidated in a single court. Various criteria might be relevant, in such circumstances, to determining which court would be the most appropriate to handle such an application. It might, for example, be the court with competence to administer insolvency proceedings with respect to the parent or controlling member of a group, where that member is included in the application. Other criteria, such as the size of indebtedness of the various group members or the centre of control of the group might also be chosen to establish the prevailing competence of one court in the domestic setting. Creditors of different group members might also be located in different places, raising issues of representation and the location in which creditor committees would meet or be constituted.

19. Although the issue of which court is competent to consider a joint application for commencement where the subject group members are located in different domestic jurisdictions might be addressed by law other than the insolvency law, it is desirable that the approach of recommendation 13 be followed. This would require the insolvency law to clearly indicate, or include a reference to, the law that establishes the court with jurisdiction over such an application. Adoption of that approach should make it clear to all relevant parties where and how such an application can be pursued. This will be of particular importance where more than one court might have jurisdiction over individual group members.

20. Where a joint application is permitted under the insolvency law, there is the potential for cost savings where, for example, the same court is considering the commencement criteria with respect to a number of members of the same enterprise group at the same time. The fees payable and other associated procedural issues associated with an application for, and commencement of, insolvency proceedings may therefore merit reconsideration in the context of joint applications (see part two, chap. I, paras. 76-78).

(g) Notice of application

21. The recommendations above with respect to notification of an application for commencement of insolvency proceedings would apply to a joint application (see part two, chap. I, paras. 64-67). A joint application by a creditor should be notified to the group members that are the subject of the application in accordance with recommendation 19 (a). Where group members make a joint application, notice to creditors and other parties in interest would not be required until proceedings commenced on the basis of that application, in accordance with recommendation 22.

Recommendations 199-201

Purpose of legislative provisions

The purpose of provisions on joint application²² for commencement of insolvency proceedings with respect to two or more enterprise group members is:

(a) To facilitate coordinated consideration of an application for commencement of insolvency proceedings with respect to those enterprise group members;

(b) To enable the court to obtain information concerning the enterprise group that would facilitate determination of whether commencement of insolvency proceedings with respect to those group members should be ordered;

(c) To promote efficiency and reduce costs; and

(d) To provide a mechanism²³ for the court to assess whether procedural coordination of those insolvency proceedings would be appropriate.

Contents of legislative provisions

Joint application for commencement of insolvency proceedings (para. 8)

199. The insolvency law may specify that a joint application for commencement of insolvency proceedings may be made with respect to two or more enterprise group members, each of which satisfies the applicable commencement standard.²⁴

Persons permitted to apply (para. 16)

200. Where the insolvency law provides for joint applications in accordance with recommendation 199, the insolvency law should specify that a joint application may be made by:

(a) Two or more enterprise group members, each of which satisfies the applicable commencement standard in recommendation 15; or

(b) A creditor, provided that:

²² A joint application for commencement does not affect the legal identity of each group member included in the application; each member remains separate and distinct.

²³ A joint application is not a prerequisite for procedural coordination, but may facilitate the court's consideration of whether an order for procedural coordination should be made.

²⁴ See above, recommendation 15, which addresses debtor applications and recommendation 16, which addresses creditor applications for commencement.

- (i) It is a creditor of each group member to be included in the application; and
- (ii) Each of those group members satisfies the commencement standard in recommendation 16.

Competent courts (paras. 17-20)

201. For the purposes of recommendation 13, the words “commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings” include a joint application for commencement of insolvency proceedings with respect to two or more enterprise group members.²⁵

2. Procedural coordination

(a) Purpose of procedural coordination

22. Procedural coordination is intended to promote procedural convenience and cost-efficiency and may not only facilitate comprehensive information being obtained on the business operations of the group members subject to the insolvency proceedings, but also assist the valuation of assets and the identification of creditors and other parties in interest and avoid duplication of effort. Procedural coordination refers to what in practice may be varying degrees of coordination with respect to the conduct and administration of multiple insolvency proceedings commenced with respect to two or more enterprise group members involving, possibly, one or more courts. Although administered in a coordinated manner, the assets and liabilities of each group member involved in the procedural coordination remain separate and distinct, thus preserving the integrity and identify of individual group members and the substantive rights of claimants. Accordingly, the effect of procedural coordination is limited to administrative aspects of the proceedings and does not touch upon substantive issues. The scope of an order for procedural coordination would generally be determined by the court in each case.

23. Multiple proceedings may be streamlined in various ways through an order for procedural coordination, facilitating sharing of information to obtain a more comprehensive evaluation of the situation of the various debtors; combining of hearings and meetings, including joint meetings of creditors; preparation of a single list of creditors and other parties in interest for the provision of notice and coordination of the provision of notice; establishment of joint deadlines; agreement on a joint claims procedure and coordinated realization and sale of assets; coordination of avoidance proceedings; and the holding of single creditor meetings or coordination among creditor committees. Streamlining may also be facilitated by the appointment of a single or the same insolvency representative to administer the insolvency proceedings or by ensuring coordination between insolvency representatives where two or more are appointed (see below, paras. 139-140). It may also involve cooperation between two or more courts or, when permitted by

²⁵ Recommendation 13 provides: The insolvency law should clearly indicate (or include a reference to the relevant law that establishes) the court that has jurisdiction over the commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings. The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, para. 18.

domestic law, administration of the multiple proceedings concerning group members in a single court.

24. Where two or more courts are involved, cooperation between them might include, for example, coordinating the holding of hearings and sharing and disclosure of information. As noted below with respect to cross-border cooperation (see chap. III, paras. 38-40), coordinated hearings may significantly promote the efficiency of parallel insolvency proceedings involving members of an enterprise group by bringing relevant stakeholders together at the same time to discuss and resolve outstanding issues or potential conflicts, thus avoiding protracted negotiations and resulting time delays. Such hearings would generally involve two or more courts holding hearings at the same time with provision for simultaneous communication so that parties can at least hear and preferably see the proceedings in each court. These hearings may be relatively more convenient to organize in a domestic setting, as they would not generally involve the challenges posed by different languages, time zones, laws, procedures and judicial traditions that may occur in the cross-border context. However, as in the international context, the conduct of such hearings might require the use of common procedures and agreement, for example, as to how filing of documents and submission of information is to be handled between different courts.

25. Various factors might be relevant to considering whether procedural coordination is appropriate in a particular case. These may relate, for example, to information substantiating the existence of the group and identifying the linkages between group members, including the position in the group of each member covered by the application, particularly where one of them was the controlling group member or parent. Although a requirement to provide such detail might be onerous in cases where creditors are permitted to apply for procedural coordination, the essence of the application is that the debtors are members of the same group and that procedural coordination will benefit the conduct and administration of insolvency proceedings. Accordingly, the court would need to be satisfied as to that relationship when determining whether proceedings should commence and procedural coordination should be ordered.

(b) Creditor participation

26. Part two chapter III discusses the participation of creditors in insolvency proceedings and in particular, the formation of creditor committees (see paras. 99-114). The considerations discussed would also apply in the context of insolvency proceedings concerning enterprise group members. With respect to such proceedings, the interests of creditors of the different group members have the potential to diverge and it is unlikely that those interests could be represented in a single creditor committee. It may also be the case, however, that where procedural coordination involving many group members is ordered, establishing a separate committee for the creditors of each member might prove to be extremely costly and inefficient for administration of the proceedings. For that reason, the courts in some States have the discretion not to establish, in appropriate circumstances, a separate creditor committee for each group member subject to insolvency proceedings. Those circumstances may include 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. The desirability of forming a single committee may also depend upon the extent to which creditors can participate in the insolvency proceedings under the applicable insolvency law (see part two, chap. III, paras. 75-83) and whether that participation can be facilitated by a creditor committee (see part two, chap. III, paras. 99-112). Where it is not appropriate to establish a single committee, it will be desirable to facilitate coordination between the various committees in the different proceedings.

(c) Timing of application

27. The benefits to be derived from procedural coordination may be apparent at the time an application for commencement is made or may arise after proceedings have commenced. It is therefore desirable that an insolvency law adopt a flexible approach to the timing of an application for procedural coordination. An application might be made at the same time as an application for commencement of proceedings or at any subsequent time. However, since the goal of procedural coordination is to coordinate the administration of multiple proceedings, the feasibility of making an order at a late stage of the proceedings would be limited, in practice, by the usefulness of so doing. In other words, there may be little advantage in seeking to coordinate proceedings that are almost completed. Similarly, the time at which additional group members became insolvent would determine whether they could be added to an existing order for procedural coordination.

28. An insolvency law might adopt the approach of stipulating a time limit for applying for procedural coordination to provide a degree of certainty. However, as is generally the case with any consideration of the need for a time limit, the advantages of establishing such a limit must be weighed against the potential disadvantages of inflexibility and the need to ensure that the time limit is properly observed (see part two, chap. I, para. 60).

(d) Persons permitted to apply

29. It is desirable that procedural coordination be as widely available as possible and that the court be given the discretion to consider whether coordination of the various proceedings would advantage their administration. The court may consider whether to order procedural coordination on its own initiative, particularly to address situations where it is determined that procedurally coordinating the proceedings would be in the best interests of the enterprise group and facilitate administration, but no application for procedural coordination is forthcoming from a party authorized to do so. The court might also order procedural coordination in response to an application from authorized parties, such as any group member subject to insolvency proceedings, the insolvency representative of a member, who would generally possess the information most relevant for making such an application, or a creditor.

30. In the case of creditors, the eligibility limitation that applies with respect to an application for commencement of insolvency proceedings (recommendation 200 (b)) need not necessarily apply. Where the application for procedural coordination is made at the time of the application for commencement, the issue of commencement should be treated separately from that of procedural coordination, since the criteria required to satisfy each issue will generally be different. Once proceedings have commenced, there is no reason to limit the ability

to make an application for procedural coordination to those creditors who are creditors of the group members to be coordinated, if procedural coordination will benefit the conduct and administration of the proceedings. Creditors of other group members might also apply; the decision to order procedural coordination should not be conditioned upon the status of the creditor applying.

(e) Competent courts

31. Procedural coordination may also raise the issues of jurisdiction noted above with respect to joint applications for commencement (see above, paras. 17-19), where different domestic courts have competence over the various group members subject to insolvency proceedings. In jurisdictions where those issues arise, they would generally be determined by reference to domestic procedural law. In some States, proceedings in different courts may be consolidated or transferred to a single court, for example, the court with competence to administer insolvency proceedings with respect to the parent of a group. A range of other criteria, such as priority of filing, size of indebtedness or centre of control, might also be chosen to establish the prevailing competence of one court in the domestic setting. A key element of consolidating or transferring proceedings to a single court would be establishing communication between the courts involved prior to that transfer. Creditors of different group members might also be located in different places, raising issues of representation and the location in which creditor committees would meet or be constituted. Where the proceedings cannot be consolidated or transferred to a single court, coordination between the competent courts will be required to ensure the goal of the procedural coordination is met.

32. Although these issues might be addressed by law other than the insolvency law, it is desirable, as noted above with respect to joint applications (see para. 19), that the approach of recommendation 13 be followed. That would require the insolvency law to clearly indicate or include a reference to the relevant law that establishes the court with jurisdiction over an application for procedural coordination.

(f) Notice with respect to procedural coordination

33. An application for procedural coordination could be subject to the same requirements for giving of notice as an application for commencement of proceedings (see recommendations 19, 22-24 and part two, chap. I, paras. 64-68). When made at the same time as the application for commencement of proceedings, only an application for procedural coordination by creditors would require notice to be given to the relevant debtors, consistent with recommendation 19.

34. An application made at that time by group members would not require creditors to be notified, consistent with recommendations 23-24, but relevant information, such as the content or implications of the order, could be included with the notice of commencement of proceedings.

35. When an application for procedural coordination is made subsequent to commencement of proceedings, it may be appropriate to provide notice to creditors, notwithstanding that procedural coordination does not affect their substantive rights. The provision of notice may be particularly important where the law makes provision, as noted above, for cases commenced in different jurisdictions to be

transferred to, or administered by, a single court and that transfer may affect procedural aspects of the proceedings of interest to creditors, such as the location of meetings of a creditor committee or the place for submission of claims.

36. Provision of notice to all creditors may be satisfied with collective notification, such as by notice in a particular legal publication, when domestic legislation so permits and when appropriate, for instance, in the case of a large number of creditors (see part two, chap. I, paras. 69-70). In addition to the information required by the recommendations above addressing provision of notice on commencement of proceedings (recommendation 25 and part two, chap. I, para. 71), notice of an order for procedural coordination might include the terms of the order and information relevant to, for example, coordination of hearings and meetings, and arrangements to be made with respect to post-commencement finance.

(g) Modifying or terminating an order for procedural coordination

37. Given that the purpose of procedural coordination is to promote administrative convenience and cost-efficiency, an insolvency law may include provisions relating to modification or termination of an order for procedural coordination to accommodate changed circumstances. That approach might be appropriate when, for example, a coordinated reorganization is not successful and the individual members should be liquidated separately. Termination of an order, although rarely required, should be possible as the initial order is not intended to affect substantive rights. As a safeguard, the insolvency law could provide that termination or modification would be possible, provided it was without prejudice to vested rights and interests arising from the initial order.

Recommendations 202-210

Purpose of legislative provisions

The purpose of provisions on procedural coordination of insolvency proceedings with respect to two or more enterprise group members is:

- (a) To facilitate coordination of the administration of those insolvency proceedings, while respecting the separate legal identity of each group member; and
- (b) To promote cost-efficiency and a better return to creditors.

Contents of legislative provisions

Procedural coordination of two or more insolvency proceedings (paras. 22-25)

202. The insolvency law should specify that the administration of insolvency proceedings with respect to two or more enterprise group members may be coordinated for procedural purposes.

203. The insolvency law should specify that, at the request of a person permitted to make an application under recommendation 206 or on its own initiative, the court²⁶ may order procedural coordination.

²⁶ Coordination might involve different courts competent with respect to different group members or a single court that is competent with respect to a number of different insolvency proceedings

204. Procedural coordination may involve, for example, appointment of a single or the same insolvency representative; establishment of a single creditor committee; cooperation between the courts, including coordination of hearings; cooperation between insolvency representatives, including information sharing and coordination of negotiations; joint provision of notice; coordination between creditor committees; coordination of procedures for submission and verification of claims; and coordination of avoidance proceedings. The scope and extent of the procedural coordination should be specified by the court.

Application for procedural coordination

— *Timing of application (paras. 27-28)*

205. The insolvency law should specify that an application for procedural coordination may be made at the same time as an application for commencement of insolvency proceedings or at any subsequent time.²⁷

— *Persons permitted to apply (paras. 29-30)*

206. The insolvency law should specify that an application for procedural coordination may be made by:

- (a) An enterprise group member that is subject to an application for commencement of insolvency proceedings or subject to insolvency proceedings;
- (b) The insolvency representative of an enterprise group member; or
- (c) A creditor²⁸ of an enterprise group member that is subject to an application for commencement of insolvency proceedings or subject to insolvency proceedings.

Coordinating consideration of an application (para. 31)

207. The insolvency law should specify that the court²⁹ may take appropriate steps to coordinate with any other competent court consideration of an application for procedural coordination of insolvency proceedings concerning two or more enterprise group members. Those steps might involve, for example, coordinated proceedings; coordinated hearings; sharing and disclosure of information.

Modification or termination of an order for procedural coordination (para. 37)

208. The insolvency law should specify that an order for procedural coordination may be modified or terminated, provided that any actions or decisions already taken pursuant to the order should not be affected by the modification or termination. Where more than one court is involved in ordering procedural coordination, those

concerning members of the same group. Accordingly, an order for procedural coordination may require action by one or more than one court.

²⁷ The possibility of ordering procedural coordination at an advanced stage of the insolvency proceedings is discussed in the commentary; see above, para. 27.

²⁸ To be eligible to make an application for procedural coordination, a creditor does not have to be a creditor of all the group members in respect of which it is seeking procedural coordination.

²⁹ See the footnote to recommendation 203.

courts may take appropriate steps to coordinate modification or termination of the procedural coordination.

Competent courts (paras. 31-32)

209. For the purposes of recommendation 13, the words “commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings” include applications and orders for procedural coordination of insolvency proceedings with respect to two or more enterprise group members.³⁰

Notice of procedural coordination (paras. 33-36)

210. The insolvency law should establish requirements for giving notice with respect to applications and orders for procedural coordination and modification or termination of procedural coordination, including the scope and extent of the order; the parties to whom notice should be given; the party responsible for giving notice; and the content of the notice.

C. Treatment of assets on commencement of insolvency proceedings

38. The manner in which the commencement of insolvency proceedings affects the debtor and its assets is discussed in detail above in part two, chapter II. In general, those effects would apply equally to commencement of insolvency proceedings with respect to two or more enterprise group members. Some of the effects that might differ in the group context are discussed below, with respect to protection and preservation of the insolvency estate; post-application finance; use and disposal of assets; post-commencement finance; avoidance; subordination; and remedies, including substantive consolidation orders.

1. Protection and preservation of the insolvency estate

(a) Application of the stay to a solvent group member

39. As noted above (see part two, chap. II, para. 26), many insolvency laws include a mechanism to protect the value of the insolvency estate that not only prevents creditors from commencing actions to enforce their rights through legal remedies during some or all of the period of insolvency proceedings, but also suspends actions already under way against the debtor. The recommendations relating to the application of that mechanism, referred to as a “stay”, would apply generally in the case of insolvency proceedings concerning two or more enterprise group members (see recommendations 39-51).

40. One issue that might arise in the context of the insolvency of enterprise groups, but not in the case of individual debtors, is the extension of the stay to an enterprise group member that is not subject to the insolvency proceedings (where the insolvency law permits a group member that is not insolvent to be included in the proceedings, this issue will not arise). The issue may be of particular relevance to enterprise groups because of the interrelatedness of the business of the group. For example, when finance is arranged on a group basis by way of cross-guarantees or

³⁰ The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, para. 18.

cross-collateralization, the finance provided to one member might affect the liabilities of another, or actions affecting the assets of group members not subject to insolvency proceedings may also affect the assets and liabilities or the ability to continue their ordinary course of business of group members with respect to which applications for commencement have been made or insolvency proceedings have commenced.

41. Extension of the stay to include the solvent member might be sought in a number of situations, for example, to protect an intra-group guarantee that relies upon the assets of the solvent group member providing the guarantee; to restrain a lender from seeking to enforce an agreement against a solvent group member, where that enforcement might affect the liability of another member subject to an application for insolvency proceedings; and to restrain enforcement of a security interest against assets of a solvent member that are central to the business of the group, including the business of group members subject to an application for insolvency proceedings. Extension of the stay in these cases has the potential to affect the business of the solvent member and the interests of its creditors, depending upon the nature of the solvent member and its function within the group structure. The day-to-day activities of a trading group member, for example, may be more adversely affected than those of a group member established to hold certain assets or obligations.

42. In some States, ordering insolvency-related relief with respect to a solvent group member (not included in insolvency proceedings) might not be possible as it would conflict, for example, with the protection of property rights or raises issues of constitutional rights. Nevertheless, it might be possible to achieve the same effect if a court could order measures of protection in conjunction with the commencement of insolvency proceedings with respect to other enterprise group members in certain cases, such as where there is an intra-group guarantee. The measures may be available at the courts' discretion, subject to such conditions as the court determines appropriate.

43. These measures might be covered by recommendation 48, which provides for the court to grant relief in addition to any relief that might be applicable automatically on commencement of insolvency proceedings (as addressed in recommendation 46). As the footnote to recommendation 48 points out, that additional relief would depend upon the types of measures available in a particular jurisdiction and the measures that might be appropriate in a particular insolvency proceeding.

44. Measures might also be available on a provisional basis. Recommendation 39 addresses provisional measures, specifying the types of relief that might be available "at the request of the debtor, creditors or third parties, where relief is needed to protect and preserve the value of the assets of the debtor or the interests of creditors, between the time an application to commence insolvency proceedings is made and commencement of the proceedings".

45. Protection for the interests of the creditors, both secured and unsecured, of the solvent group member, might also be found in the relevant recommendations above. Recommendation 51, for example, specifically addresses the issue of protection of secured creditors and grounds for relief from the stay applicable on commencement and might be extended to secured creditors of the solvent group member. Other

grounds for relief from the stay might relate to the financial situation of the solvent member and the continuing effect of the stay on its day-to-day operations and, potentially, its solvency.

46. Where a secured creditor is a member of the same enterprise group as the debtor or debtors, a different approach to the question of protection might be required, especially where the insolvency law permits substantive consolidation or subordination of related person claims (see below, paras. 84-88).

(b) Post-application finance

47. The discussion on post-commencement finance in part two, chapter II recognizes that the continued operation of the debtor's business after the commencement of insolvency proceedings is critical to reorganization and, to a lesser extent, liquidation, where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services, including labour costs, insurance, rent, maintenance of contracts and other operating expenses, as well as costs associated with maintaining the value of assets.

48. The same need for finance also occurs in the period between the time an application for commencement of insolvency proceedings is made and commencement of those proceedings (referred to as post-application finance). When an enterprise group member becomes insolvent and makes an application for commencement of insolvency proceedings, that application often triggers an event of default under existing loan agreements, entitling the lender to discontinue advancing funds under those agreements. Where an insolvency law does not provide for automatic commencement of insolvency proceedings upon application, it can often take a period of several months between the making of an application and the commencement of the proceedings, during which time, the courts must make an independent evaluation as to whether the debtors subject to the application meet the statutory criteria to commence proceedings. However, if the group member is to continue as a going concern while this determination is being made, it must be able to continue to conduct its business, pay its employees, pay its suppliers and generally continue its day-to-day activities. The availability or lack of financing during this interim period can determine or significantly influence whether reorganization will ultimately be a viable option or whether liquidation will be required. Where the business of the insolvent group member is closely related to that of other group members, its ability to keep operating may affect the solvency of those other members and ultimately, depending upon its position in the group hierarchy, the solvency of the group as a whole.

49. As noted above (part two, chap. II, para. 96), in the absence of enabling or clarifying treatment in the insolvency law, the provision of finance in this period before commencement of the insolvency proceedings may raise difficult questions relating to the application of avoidance powers and the liability of both the lender and the debtor. Some insolvency laws provide, for example, that where a lender advances funds to an insolvent debtor in the period before commencement of proceedings, the lender may be responsible for any increase in the liabilities of other creditors or the advance may be subject to avoidance in any ensuing insolvency proceedings as a preferential transaction.

50. The existence of a provision under the insolvency law enabling finance to be obtained for the period of time between the making of an application and the commencement of the proceedings would provide the necessary authorization and give any existing or new lender the assurance and incentive necessary to provide additional financing to cover that period.

51. As noted above (see para. 44), recommendation 39 permits the court to order provisional measures to preserve the assets of the debtor prior to the commencement of insolvency proceedings. Since those measures could include authorizing post-application finance, the provision of that finance should therefore be regarded as being within the purview of recommendation 39.

2. Use and disposal of assets

52. It is noted above (see part two, chap. II, para. 74) that, although as a general principle it is desirable that an insolvency law not interfere unduly with the ownership rights of third parties or the interests of secured creditors, the conduct of insolvency proceedings will often require assets of the insolvency estate, and assets in the possession of the debtor being used in the debtor's business, to continue to be used or disposed of (including by way of encumbrance) in order to enable the goal of the particular proceedings to be realized.

53. Where insolvency proceedings concern two or more enterprise group members, issues may arise with regard to the use of assets belonging to a group member not subject to insolvency proceedings to support ongoing operations of those members subject to such proceedings, pending resolution of the proceedings. Where those assets are in the possession of one of the group members subject to insolvency proceedings, recommendation 54, which addresses the use of third-party owned assets in the possession of the debtor, may be sufficient.

54. Where those assets are not in the possession of any of the group members subject to insolvency proceedings, recommendation 54 generally will not apply. There may be circumstances, however, where the solvent group member in possession of those assets is included in the insolvency proceedings or the provisions of a group reorganization plan should cover the assets (see below, para. 152, for a discussion of the inclusion of a solvent group member in a reorganization plan). Where the solvent group member is not included in the proceedings, the question will be whether those assets can be used to support group members subject to insolvency proceedings and if so, the conditions to which that use would be subject. The use of those assets might raise questions of avoidance, particularly where the supporting member subsequently became insolvent, and also raises concerns for creditors of that member.

3. Post-commencement finance

(a) The need for post-commencement finance

55. The discussion on post-commencement finance above in part two, chapter II (see paras. 94-95), recognizes that the continued operation of the debtor's business after the commencement of insolvency proceedings is critical to reorganization and, to a lesser extent, liquidation where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services, including labour costs,

insurance, rent, maintenance of contracts and other operating expenses, as well as costs associated with maintaining the value of assets. It is also noted, however, that many jurisdictions restrict the provision of new money in insolvency or do not specifically address the issue of new finance or the priority for its repayment in insolvency. Of those laws that do address post-commencement finance, very few, if any, specifically address the issue in the context of enterprise groups.

56. Post-commencement finance may be even more important in the group context than it is in the context of individual insolvency proceedings. If there are no ongoing funds there is very little prospect of reorganizing an insolvent enterprise group or selling all or parts of it as a going concern. The economic impact of that failure is likely to be much greater, especially in large groups, than it would be in the case of an individual debtor. The reasons for promoting the availability of post-commencement finance in the group context are therefore similar to the case of the individual debtor, although a number of issues different to those relating to the individual debtor are likely to arise. These issues may include: balancing the interests of individual enterprise group members with what is required for the reorganization of the group as a whole; provision of post-commencement finance by solvent group members, especially in cases where issues of control might arise (such as where that solvent member is controlled by the insolvent parent of the group); treatment of transactions between group members that are essentially related persons (see main glossary, para. (jj)); provision of finance by group members subject to insolvency proceedings; and the desirability of maintaining, in insolvency proceedings, the financing structure that the group had before the onset of insolvency, especially where that structure involved pledging all of the assets of the group for finance that was channelled through a centralized group entity with treasury functions.

57. The use of post-commencement finance in the group context will involve consideration of the desirability and impact of that financing not only for the group member receiving the benefit of the finance but also the group member providing the finance or facilitating its provisions by way of a security interests or guarantee. Where that consideration involves more than one insolvency representative, coordination and agreement between them will be crucial. Where only one insolvency representative is appointed to administer several group members, potential conflicts of interest connected with post-commencement finance will need to be considered and addressed.

(b) Sources of post-commencement finance in a group context

58. As noted above in part two, chapter II (see para. 99), post-commencement finance is likely to come from a limited number of sources. In the enterprise group context, that might include sources both external and internal to the group, where internal sources might include both solvent group members and group members already subject to insolvency proceedings. While some of the incentives for providing post-commencement finance might be the same for internal and external lenders, internal lenders may have the added inducement of their own survival where they are to be part of a reorganization.

(i) Provision of post-commencement finance by a solvent group member

59. As noted above, one of the questions with respect to post-commencement finance in the enterprise group context is whether the assets of a solvent group member can be used, for example, as the basis for granting a security interest or providing a guarantee, to obtain financing for an insolvent member from an external source or to fund the insolvent member directly and, if so, the implications for the recommendations concerning priority and security. A solvent group member might have an interest in the financial stability of the parent, other group members or the group as a whole in order to ensure its own financial stability and the continuation of its business, particularly where it is closely integrated with or reliant upon insolvent members for ongoing business activity. This may commonly occur, for example, in a vertically integrated manufacturing group. Different types of solvent entities, such as special purpose entities with few liabilities and valuable assets, might be involved in different ways in the insolvency of other group members, such as by granting a guarantee or security interest to secure new finance for insolvent group members.

60. However, use of the assets of a solvent group member in that way, especially where that solvent member is likely to become, or subsequently becomes, insolvent, raises a number of questions. While the solvent entity might provide that finance on its own authority under relevant company law and not under the insolvency law, the consequences of that provision of finance ultimately may be regulated by the insolvency law. Questions may arise, for example, as to: whether a solvent group member would be entitled to the priority provided by recommendation 64 if it provided funding to an insolvent group member; whether the claim arising from that transaction would be subject to special treatment because it occurred between related parties pursuant to recommendation 184; or whether such a transaction might be considered a preferential transaction and thus subject to avoidance in any subsequent insolvency of the member providing the finance. Under some laws, providing such finance may be prohibited as constituting a transfer of the assets of a solvent entity to an insolvent entity to the detriment of the creditors and shareholders of the solvent entity.

61. Some of the difficulties associated with provision of finance by a solvent group member might be solved if addressed in the context of a reorganization plan, in which the solvent group member, as well as external finance providers, could participate on a contractual basis. While there might be situations in which that approach would be appropriate, the requirement for post-commencement finance at any early stage of the insolvency proceedings suggests it is likely to be of limited application. In reorganization proceedings, for example, such finance would generally be required before a reorganization plan could be negotiated and approved. Where the business was to be sold as a going concern there would be no reorganization plan, but finance might nevertheless be required to maintain the business prior to a sale.

(ii) Provision of post-commencement finance by an insolvent group member

62. Provision of post-commencement finance by one group member subject to insolvency proceedings to another such member is not directly addressed elsewhere in the *Guide*. Some of the general prohibitions under existing laws associated with insolvent entities borrowing and lending funds may need to be further considered to

facilitate provision of post-commencement finance in that situation. The policy rationale for those prohibitions is likely to be clearly evident when both the lender and the borrower are not only insolvent and subject to insolvency proceedings, but also members of the same enterprise group. The group context may also raise concerns with respect to the duties and obligations of the insolvency representatives, when the insolvency representative of one insolvent group member seeks to facilitate the provision of post-commencement finance to another insolvent group member and the insolvency representative of the second group member to obtain that post-commencement finance. In those cases, it is desirable that the insolvency law address both the providing and receiving sides of the post-commencement finance.

63. While it may generally be expected that a group member subject to insolvency proceedings would not have the ability to provide post-commencement finance to another such member or to provide support for its provision, there may be circumstances, albeit potentially limited, where it would be both possible, and desirable, particularly when the interests of the enterprise group are considered as a whole. To the extent that the provision of such finance has an impact on the rights of existing creditors, both secured and unsecured, of both group members, it is desirable that it be balanced against the prospect that preservation of going concern value by the continued operation of the business will ultimately provide benefit to those creditors. A balance might also be desirable between sacrificing one group member for the benefit of other members and achieving a better overall result for all members. Although potentially difficult to achieve, the goal might be fair apportionment of any harm that arises from such post-commencement finance in the short term with a view to the long term gain, rather than the sacrifice of one member (and its creditors) for the benefit of others involved in the post-commencement finance.

(c) Addressing the provision and receipt of post-commencement finance in the group context

64. Recommendations 63-68 aim to promote the availability of finance for continued operation or survival of the debtor's business and ensure appropriate protection for the providers of post-commencement finance, as well as for other parties whose rights may be affected by the provision of post-commencement finance. In the enterprise group context, these recommendations would apply to the provision of post-commencement finance to group members subject to insolvency proceedings by lenders external to the group and solvent members of the group.

65. Recommendation 63 establishes the basis for obtaining post-commencement finance (that the insolvency representative determines it to be necessary for the continued operation or survival of the business of the debtor or the preservation or enhancement of the value of the estate) and its authorization (by the court or by creditors). Those requirements remain relevant in the context of enterprise groups and for the avoidance of doubt, recommendation 63 should be interpreted as including a group member subject to insolvency proceedings that obtains post-commencement finance from either an external lender or a solvent member of the same group. What recommendation 63 does not address is a group member subject to insolvency proceedings providing post-commencement finance directly to another group member subject to insolvency proceedings or facilitating its provision

by way of security interest or guarantee or the receipt of such finance by the insolvent group member.

66. To parallel the requirements of recommendation 63 and address the group member providing the finance, it might be desirable to require the insolvency representative of that providing group member to determine that the provision of the post-commencement finance is necessary for the continued operation or survival of the business of that group member or the preservation or enhancement of the value of its estate. An additional requirement might be that any harm to creditors of the providing group member must be offset by the benefit to be derived from the granting of the security interest.

67. Consistent with recommendation 63, the insolvency law might also require the court to authorize or creditors of the providing group member to consent to the post-commencement finance. Given that new finance may be required on a fairly urgent basis to ensure the continuity of the business, it is desirable that the number of authorizations required be kept to a minimum. The advantages and disadvantages of the different considerations with respect to authorization that would also apply in the group context are discussed above (see part two, chap. II, paras. 105-106). It may be added that since the issues to be determined are likely to be more complex in that context, involving as they do a larger number of parties and complex interrelationships, it is most likely to be the insolvency representatives of the relevant group members who will be in the best position to assess the impact of the proposed financing arrangement, in much the same way as they are with respect to determining the need for new finance under recommendation 63. If the involvement of the courts or creditors is considered desirable, however, it should be borne in mind that issues of delay may be encountered where there are a large number of creditors to be consulted or where the court does not have the ability to make speedy decisions.

(d) Conflict of interest

68. The provision of finance in the group context raises issues concerning possible prejudice and conflict of interest that are not relevant in the case of a single debtor. A conflict of interest might arise, for example, in balancing the interests of the group as a whole against the potentially different interests of the lender and the receiver of post-commencement finance. A particular concern might arise where a single or the same insolvency representative is appointed to administer the insolvency proceedings of a number of group members. The insolvency representative of the member providing the finance might also be the insolvency representative of the receiving member and will be required to assess the interests of each member individually, as well as the interests of the group. That situation might be addressed in several ways in the insolvency law, such as by requiring court or creditor approval of the post-commencement finance as suggested by recommendation 63 or by appointing one or more additional insolvency representatives to ensure the interests of the creditors of the different group members are protected (see below, para. 144). The appointment might be for the time required to address that specific conflict or on more general terms for the duration of the proceedings.

69. There is also the question of whether an insolvent group member might, as part of the financing arrangements of the enterprise group as a whole, be requested

to guarantee finance provided to a solvent group member as part of the ongoing financial arrangements of the group. Since the provision of that guarantee is likely to constitute a disposal of the assets of the insolvent group member, it would probably be covered by the recommendations addressing that issue (see recommendations 52-62).

(e) Priority for post-commencement finance

70. Recommendation 64 specifies the need to establish the priority to be accorded to post-commencement finance and the level of that priority, i.e. ahead of ordinary unsecured creditors, including those with administrative priority, and would apply in the group context where post-commencement finance is provided to a group member by an external lender. In that situation, according priority continues to provide an important incentive for the provision of such financing. However, the inducement required for the provision of post-commencement finance to a group member subject to insolvency proceedings by another group member is perhaps slightly different.

71. The particular interest of a group member providing finance may relate more to the insolvency outcome for the group as a whole (including that member), than to commercial considerations of profit or short-term gains, especially where there is a high degree of integration or reliance between the businesses of the group members. In those circumstances, it might be necessary to consider whether the level of priority accorded by recommendation 64 would be appropriate. One view might be that that level of priority provides appropriate incentive for the provision of finance and affords appropriate protection to the creditors of the provider, irrespective of whether the provider is external or internal to the group. Another view might be that because the transaction involves related persons in a group context, it is desirable to accord a lower priority to protect the interests of creditors more generally and achieve a balance between the interests of the finance provider's creditors and those of the group member receiving the finance. Whichever approach is adopted, it is desirable that the insolvency law accords priority to such lending and specifies the appropriate level.

(f) Security for post-commencement finance

72. Recommendations 65-67 address issues relating to the granting of security for post-commencement finance and generally would be applicable in the enterprise group context. A group member subject to insolvency proceedings may grant a security interest of the type referred to in recommendation 65 to secure post-commencement finance it has obtained for its own use. That situation is clearly covered by recommendations 65-67. A group member subject to insolvency proceedings may also grant a security interest of the type referred to in recommendation 65 to secure repayment of post-commencement finance provided to another group member subject to insolvency proceedings. In the latter situation, the group member is granting the security over its unencumbered assets, but is not directly receiving the benefit of the post-commencement finance and is potentially diminishing the pool of assets available to its creditors. It may, however, derive an indirect benefit when the provision of the finance facilitates a better solution for the insolvency of the group as a whole and, as noted above, any short-term detriment is offset by the long-term gain for creditors, including its own creditors. The member

receiving the finance is deriving a direct benefit, but increasing its indebtedness to the potential detriment of its creditors, although they should also benefit in the longer term.

73. Where it is considered desirable to accord a security interest granted to secure new finance a priority ahead of an existing security interest over the same asset, as contemplated by recommendation 66, the safeguards applicable under that recommendation and recommendation 67 would apply in the group context.

(g) Guarantee or other assurance of repayment for post-commencement finance

74. The granting of a guarantee by one group member for payment of new finance to another is not a situation that arises in the case of an individual debtor and is therefore not addressed elsewhere in the *Guide*. However, since the considerations that arise are similar to those discussed above with respect to the granting and obtaining of a security interest, it may be appropriate to adopt the same approach with respect to the determinations to be made by the insolvency representatives of both the granting and obtaining group members and the possible authorization by the court or consent of creditors.

Recommendations 211-216

Purpose of legislative provisions

The purpose of provisions on post-commencement finance in the context of enterprise groups is:

- (a) To facilitate finance to be obtained by enterprise group members subject to insolvency proceedings for the continued operation or survival of their business or the preservation or enhancement of the value of their assets;
- (b) To facilitate the provision of finance by enterprise group members, including group members subject to insolvency proceedings;
- (c) To ensure appropriate protection for the providers and receivers of post-commencement finance and for those parties whose rights may be affected by the provision of that finance; and
- (d) To advance the objective of fair apportionment of the benefit and detriment associated with the provision of post-commencement finance among all group members involved.

Contents of legislative provisions

Post-commencement finance provided by a group member subject to insolvency proceedings to another group member subject to insolvency proceedings (paras. 62-67)

211. The insolvency law should permit an enterprise group member subject to insolvency proceedings to:

- (a) Advance post-commencement finance to other enterprise group members subject to insolvency proceedings;
- (b) Grant a security interest over its assets for post-commencement finance provided to another enterprise group member subject to insolvency proceedings; and

(c) Provide a guarantee or other assurance of repayment for post-commencement finance provided to another enterprise group member subject to insolvency proceedings.

212. The insolvency law should specify that post-commencement finance may be provided in accordance with recommendation 211, where the insolvency representative of the group member advancing finance, granting a security interest or providing a guarantee or other assurance:

(a) Determines it to be necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of the estate of that enterprise group member; and

(b) Determines that any harm to creditors of that group member will be offset by the benefit to be derived from advancing finance, granting a security interest or providing a guarantee or other assurance.

213. The insolvency law may require the court to authorize or creditors to consent to the advance of finance, grant of a security interest or provision of a guarantee or other assurance in accordance with recommendations 211 and 212.

Post-commencement finance obtained by a group member subject to insolvency proceedings from another group member subject to insolvency proceedings (paras. 64-67)

214. The insolvency law should specify that in accordance with recommendation 63, post-commencement finance may be obtained from an enterprise group member subject to insolvency proceedings by another group member subject to insolvency proceedings where the insolvency representative of the receiving group member determines it to be necessary for the continued operation or survival of the business of that group member or for the preservation or enhancement of the value of its estate. The insolvency law may require the court to authorize or creditors to consent to the obtaining of that post-commencement finance.

Priority for post-commencement finance (paras. 70-71)

215. The insolvency law should specify the priority that applies to post-commencement finance provided by one enterprise group member subject to insolvency proceedings to another group member subject to insolvency proceedings.

Security for post-commencement finance (pars. 72-73)

216. The insolvency law should specify that recommendations 65, 66 and 67 apply to the granting of a security interest in accordance with recommendation 211 (b).

4. Avoidance proceedings

(a) Nature of enterprise group transactions

75. Recommendations 87-99 relating to avoidance would generally apply to avoidance of transactions in the context of an enterprise group, although additional considerations may apply to transactions between group members because of the group structure and the different relationships that group members may have to each

other. A significant expenditure of time and money may be required to disentangle the layers of intra-group transactions in order to determine which, if any, are subject to avoidance. As noted above (part two, chap. II, para. 155), that cost associated with avoidance proceedings must be weighed against the likelihood of recovering assets and the overall benefit to the estate in the circumstances of each case. Some transactions that might appear to be preferential or undervalued as between the immediate parties might be considered differently when viewed in the broader context of an enterprise group, where the benefits and detriments of transactions might be more widely assigned. Those transactions, for example, contracts entered into for purposes of transfer pricing³¹ may involve terms and conditions that are different to those included in similar contracts entered into by unrelated commercial parties on usual commercial terms. Similarly, some legitimate transactions occurring within an enterprise group may not be commercially viable outside the group context if the benefits and detriments were to be analysed on normal commercial grounds.

76. Intra-group transactions may represent a range of different activities. They may include: trading between group members; channelling of profits upwards from one group member to a controlling group member; loans from one member to another to support continued trading by the borrowing member; asset transfers and guarantees between group members; payments by one group member to a creditor of a related group member; or a guarantee or mortgage given by one group member to support a loan by an external lender to another group member. A group may have the practice of putting all available money and assets in the group to the best commercial use in the interests of the group as a whole, as opposed to the interests or benefit of the group member to which they belong. This might include sweeping cash from some group members into the financing group member. Although this might not always be in the best interests of the individual group members, some laws permit directors of wholly owned group members, for example, to act in that manner, provided it is in the best interests of the controlling group member.

(b) Avoidance criteria in the enterprise group context

77. An issue that may need to be considered in the group context is the goal of avoidance provisions. It could be to protect intra-group transactions in the interests of the group as a whole, on the basis that they are normal “ordinary course” business transactions or it could be to subject them to particular scrutiny and a greater likelihood of avoidance because of the relationship between transacting parties as group members and the provisions of the insolvency law applicable to related person transactions. “Related person” is defined to include enterprise group members such as a parent, subsidiary, partner or affiliate of the insolvent group member with respect to which insolvency proceedings have commenced or a person, including a legal person, that is or has been in control of the debtor (main glossary, para. (jj)).

³¹ Transfer pricing refers to the pricing of goods and services within a multidivisional organization. Goods from the production division may be sold to the marketing division, or goods from a parent company may be sold to a foreign subsidiary. The choice of the transfer prices affects the division of the total profit among the parts of the company. It can be advantageous to choose them so that, in terms of bookkeeping, most of the profit is made in a country with low taxes.

78. In some cases, a stricter regime may be justified on the basis that related persons are more likely to be favoured and, because they tend to have the earliest knowledge of when a particular group member is, in fact, in financial difficulty, they also have a greater opportunity to take advantage of that situation. Assets may, for example, be transferred from the distressed group member to other group members to enable those assets to continue to be used in the group context and avoid them being subject to any insolvency proceedings. Moreover, group members may have common shareholders and directors that control transactions between group members or have the ability to determine operational and financial policy decisions. Such situations have the potential to render intra-group transactions more vulnerable to avoidance than where they occurred between unrelated parties. The mere existence of the enterprise group, however, may not always provide sufficient justification to treat all intra-group transactions as transactions between related persons that should be subject to avoidance, as noted above (part two, chap. V, para. 48).

79. Therefore, while some of the transactions occurring in the group context may be clearly identified as falling within the categories of transactions subject to avoidance under recommendation 87, other transactions may not be so clearly within the scope of that recommendation and may need to be carefully examined to determine where the associated benefits and detriments actually lie. These transactions may raise issues concerning the extent to which the group was operated as a single enterprise or the assets and liabilities or activities of group members were closely intermingled, thus potentially affecting the nature of the transactions between members and between members and external creditors. There may be transactions that are intra-group transactions because they cannot be conducted in other ways or because they result from the manner in which the group is structured. In some situations, for example, finance may only be available on an intra-group basis and there would be no justification to treat such a transaction more strictly than if it involved an external lender. Similarly, a group may involve centralized cash flow and transfers of cash, as noted above, that would not occur where there was no group. In the situation of intra-group guarantees described above with respect to post-commencement finance, the provider of a guarantee may not derive direct benefit from the finance provided, but rather indirect benefit because they might be dependent upon the borrowing entity in the context of the activities of the group (e.g. as a supplier of component parts in a manufacturing business or a provider of intellectual property) or for some other group related reason. In considering such intra-group transactions, it will be desirable for the court to be able to take the group context into account and consider factors such as those mentioned above.

80. There may also be transactions occurring in a group context that are not covered by the terms of avoidance provisions. Some insolvency laws, for example, provide for avoidance of preferential payments to a debtor's own creditors, but not to the creditors of another group member, unless the payment is made, for example, pursuant to a guarantee. For these reasons, it is desirable that an insolvency law consider those issues in the group context and include group-related factors as matters to be taken into account in determining whether a particular transaction between group members would be subject to avoidance under recommendation 87.

81. Recommendation 97 addresses the elements to be proven to avoid a particular transaction and defences to avoidance. It may be appropriate to consider how those elements would apply in the group context and whether a different approach is required. One approach to the burden of proof in the case of transactions with related persons, for example, might be to provide that the requisite intent or bad faith is deemed or presumed to exist where certain types of transactions are undertaken within the suspect period and the counterparty to the transaction will have the burden of proving otherwise. Some laws, for example, have established a rebuttable presumption that certain transactions among group members and the shareholders of that group would be detrimental to creditors and therefore subject to avoidance. A different approach would be to acknowledge that, as noted above, transactions occurring within a group, although not always commercially viable if occurring outside the group context, are generally legitimate, especially when occurring within the limits of relevant applicable law and within the ordinary course of business of the group members concerned. Such a transaction might nevertheless be subjected to special scrutiny in much the same way as is recommended for claims by related persons in recommendation 184, an approach followed by some laws that also permit the rights of related group members under intra-group debt arrangements to be deferred or subordinated to the rights of external creditors of the insolvent members.

82. Recommendation 93 makes limited provision for a creditor to commence an avoidance proceeding with the approval of the insolvency representative or leave of the court. In the group context, it may be desirable to maintain the same approach, even though it may prove difficult in practice. The level of integration of the group may have the potential to significantly affect the ability of creditors to identify the group member with which they dealt and thus provide the requisite information for commencing avoidance proceedings.

Recommendations 217-218

Purpose of legislative provisions

The purpose of avoidance provisions as among enterprise group members is to provide, in addition to the considerations set forth in recommendations 87-99, that the insolvency law may:

- (a) Permit the court to take into account that the transaction took place in the context of an enterprise group and
- (b) Establish the circumstances that may be considered by the court.

Contents of legislative provisions

Avoidable transactions (paras. 79-80)

217. The insolvency law should specify that, in considering whether a transaction of the kind referred to in recommendation 87 (a), (b) or (c) that took place between enterprise group members or between an enterprise group member and other related persons should be avoided, the court may have regard to the circumstances in which the transaction took place. Those circumstances may include: the relationship between the parties to the transaction; the degree of integration between enterprise group members that are parties to the transaction; the purpose of the transaction;

whether the transaction contributed to the operations of the group as a whole; and whether the transaction granted advantages to enterprise group members or other related persons that would not normally be granted between unrelated parties.

Elements of avoidance and defences (para. 81)

218. The insolvency law should specify the manner in which the elements referred to in recommendation 97 would apply to avoidance of transactions in the enterprise group context.³²

5. Subordination

83. It is noted above (see part two, chap. V, para. 56) that subordination refers to a rearranging of creditor priorities in insolvency and does not relate to the validity or legality of the claim. Notwithstanding the validity of a claim, it might nevertheless be subordinated because of a voluntary agreement between creditors, where one creditor agrees to subordinate its claim to that of the other creditor or by a court order, as the result, for example, of improper conduct by a creditor or related party of the debtor, in which case the claim might be subordinated to the claims of all other creditors. Two types of claims that typically may be subordinated in insolvency are those of persons related to the debtor and of owners and equity holders of the debtor, both of which are relevant in the enterprise group context.

(a) Related person claims

84. In the group context, subordination of related person claims might mean, for example, that the rights of group members under intra-group arrangements could be deferred to the rights of external creditors of those group members subject to insolvency proceedings.

85. As explained, the term “related person” would include enterprise group members. However, the mere fact of a special relationship with the debtor, including, in the group context, membership of the same enterprise group, may not be sufficient in all cases to justify special treatment of a creditor’s claim, especially since to do so can in turn disadvantage the creditors of that creditor. In some cases, those claims will be entirely transparent and should be treated in the same manner as similar claims made by creditors who are not related persons; in other cases, they may give rise to suspicion and will deserve special attention. An insolvency law may need to include a mechanism to identify those types of conduct or situation in which claims will deserve additional attention. Similar considerations apply, as noted above, with respect to avoidance of transactions occurring between enterprise group members.

86. A number of situations in which special treatment of a related person’s claim might be justified (e.g., where the debtor is severely undercapitalized and where there is evidence of self-dealing) are identified in part two, chapter V, para. 48 and would generally be relevant in the group context. Additional considerations might include, as between a controlling and a controlled group member: the controlling member’s participation in the management of the group member; whether the

³² That is, the elements to be proved in order to avoid a transaction, the burden of proof, specific defences to avoidance and the application of special presumptions.

controlling member has sought to manipulate intra-group transactions to its own advantage at the expense of external creditors; or whether the controlling member has otherwise behaved unfairly, to the detriment of creditors and shareholders of the controlled group member. Examples of unfair behaviour might include the imposition of excessive management or consulting fees or dividend policies designed to strip the controlled group member of its funds. Under some laws, the existence of those circumstances might result in the controlling member having its claims subordinated to those of unrelated unsecured creditors or even minority shareholders of the controlled group member.

87. Some laws include other approaches to intra-group transactions such as permitting debts owed by a group member that borrowed funds under an intra-group lending arrangement to be involuntarily subordinated to the rights of external creditors of that borrowing member; permitting the court to review intra-group financial arrangements to determine whether particular funds given to a group member should be treated as an equity contribution rather than as a loan, where the law subordinates equity contributions to creditor claims (on treatment of equity, see below); and allowing voluntary subordination of intra-group claims to those of external creditors.

88. The practical result of subordination in an enterprise group context might be to reduce or effectively extinguish any repayment to those group members whose claims have been subordinated if the claims of secured and unsecured external creditors are large in relation to the funds available for distribution. In some cases this might threaten the viability of the subordinated group member and be detrimental not only to its own creditors, but also its shareholders and, in the case of reorganization, to the group as a whole. The adoption of a policy of subordinating such claims may also have the effect of discouraging intra-group lending.

(b) Treatment of equity

89. Many insolvency laws distinguish between the claims of owners and equity holders that may arise from loans extended to the debtor or their ownership interest in the debtor (see part two, chap. V, para. 76). With respect to claims arising from equity interests, many insolvency laws adopt the general rule that the owners and equity holders of the business are not entitled to a distribution of the proceeds of assets until all other claims that are senior in priority have been fully repaid (including claims of interest accruing after commencement). As such, these parties will rarely receive any distribution in respect of their interest in the debtor. Where a distribution is made, it would generally be made in accordance with the ranking of shares specified in the company law and the corporate charter. Debt claims, such as those relating to loans, however, are not always subordinated.

90. Few insolvency laws specifically address subordination of equity claims in the enterprise group context. One law that does, allows the courts to review intra-group financial arrangements to determine whether particular funds given to a group member subject to insolvency proceedings should be treated as an equity contribution, rather than as an intra-group loan, enabling it to be postponed behind creditors' claims. Those funds are likely to be treated as equity where the original debt to equity ratio was high before the funds were contributed and the funds would reduce the ratio; if the paid-up share capital was inadequate; if it is unlikely that an external creditor would have made a loan in the same circumstances; and if the

terms on which the advance was made were not reasonable and there was no reasonable expectation of repayment.

91. Subordination is discussed above in the context of treatment of claims and priorities, but the *Guide* does not recommend the subordination of any particular types of claims under the insolvency law, simply noting that subordinated claims would rank after claims of ordinary unsecured creditors (recommendation 189).³³

D. Remedies

92. Because of the nature of enterprise groups and the way in which they operate, there may be a complex web of financial transactions between group members, and creditors may have dealt with different members or even with the group as a single economic entity, rather than with members individually. Disentangling the ownership of assets and liabilities and identifying the creditors of each group member may involve a complex and costly legal inquiry. However, because adherence to the separate entity approach means that each group member is only liable to its own creditors, it may become necessary, when insolvency proceedings have commenced with respect to two or more group members, to disentangle the ownership of assets and liabilities.

93. When this disentangling can be effected, adherence to the separate entity principle operates to limit creditor recovery to the assets of the specific group member of which they are creditors. Where it cannot be affected or other specified reasons exist to treat the group as a single enterprise, some laws include remedies that allow the single entity approach to be set aside. Historically, these remedies have been developed to overcome the perceived inefficiency and unfairness of the traditional separate entity approach in specific group cases. In addition to setting aside intra-group transactions or subordinating intra-group lending, the remedies may include: the extension of liability for external debts to solvent group members, as well as to office holders and shareholders; contribution orders; and pooling or substantive consolidation orders. Some of these remedies require findings of fault to be made, while others rely upon the establishment of certain facts with respect to the operations of the enterprise group. In some cases, particularly where misfeasance of management is involved, other remedies might more appropriately be employed, such as removing the offending directors and limiting management participation in reorganization.

94. Because of the potential inequity that may result when one group member is forced to share assets and liabilities with other group members that may be less solvent, remedies setting aside the single entity approach are not universally available, generally not comprehensive and apply only in restricted circumstances. Those remedies involving extension of liability may involve “piercing” or “lifting the corporate veil”, which may result in shareholders, who are generally shielded from liability for the enterprise’s activities, being held liable for certain activities. The remedies discussed below do not involve lifting the corporate veil, although in some circumstances the effect may appear to be similar.

³³ See also the UNCITRAL Legislative Guide on Secured Transactions, chap. V.

1. Extension of liability

95. Extending the liability for external debts and, in some cases, the actions of the group members subject to insolvency proceedings to solvent group members and relevant office holders is a remedy available under some laws to individual creditors on a case-by-case basis and depends upon the circumstances of that creditor's relationship with the debtor.

96. Many laws recognize circumstances in which exceptions to the limited liability of corporate entities are available and one group member and relevant office holders could be found liable for the debts and actions of another group member. Some laws adopt a prescriptive approach and the circumstances are strictly limited; other laws adopt a more expansive approach, giving the courts broad discretion in evaluating the circumstances of a particular case on the basis of specific guidelines. In both cases, however, the basis for extending liability beyond the insolvent group member is the relationship between that group member and related group members in terms of both ownership and control. A further relevant factor may be the conduct of the related group member with respect to the creditors of the member subject to insolvency proceedings.

97. Whilst there are different formulations of the circumstances in which liability might be extended, examples generally fall into the following categories, although it should be noted that not all laws reflect all of these categories and to some extent they may overlap:

(a) Exploitation or abuse by one group member (perhaps the parent) of its control over another group member, including operating that group member continually at a loss in the interests of the controlling group member;

(b) Fraudulent conduct by the dominant shareholder, which might include fraudulently siphoning off a group member's assets or increasing its liabilities, or conducting the affairs of the group member with intent to defraud creditors;

(c) Operating a group member as the parent or controlling group member's agent, trustee or partner;

(d) Conducting the affairs of the group or of a group member in such a way that some classes of creditors might be prejudiced (for example, incurring liabilities to employees of one group member);

(e) Artificial fragmentation of a single enterprise into several different entities for the purposes of insulating the single enterprise from potential liabilities; failure to follow the formalities of treating group members as separate legal entities, including disregarding the limited liability of group members or confusing personal and corporate assets; or where the enterprise group structure is a mere sham or facade, such as where the corporate form is used as a device to circumvent statutory or contractual obligations;

(f) Inadequate capitalization of an entity, so that it does not have an adequate capital basis for carrying out its operations. This may apply at the time of establishment, or be the result of depletion of the capital by way of refunds to shareholders or by shareholders drawing more than distributable profits;

(g) Misrepresentation of the real nature of the enterprise group, leading creditors to believe that they are dealing with a single enterprise, rather than with a member of a group;

(h) Misfeasance, where any person, including a group member, can be required to compensate for any loss or damage to another group member arising from fraud, breach of duty or other misfeasance, such as actions causing significant injury or environmental damage;

(i) Wrongful trading, where directors, including shadow directors of a group member have a duty to monitor, for example, whether that group member can properly continue carrying on business in the light of its financial condition and are required to apply for insolvency within a specified period once it has become insolvent. Permitting or directing a group member to incur debts when it is or is likely to become insolvent would fall into this category; and

(j) Failing to observe regulatory requirements, such as keeping regular accounting records of a subsidiary or controlled group member.

98. Generally, the mere incidence of control or domination of a group member by another group member, or other form of close economic integration within an enterprise group, is not regarded as sufficient reason to justify disregarding the separate legal personality of each group member and piercing the corporate veil.

99. In a number of the examples where liability might be extended to the controlling group member, that liability may include the personal liability of the members of the board of directors of the controlling group member (who may be described as *de facto* or shadow directors). While directors of an individual group member may generally owe certain duties to that group member, they may be faced with balancing those duties against the overall commercial and financial interests of the group. Achieving the general interests of the group, for example, may require that the interests of individual members be sacrificed in certain circumstances. Some of the factors that might be relevant to determining whether directors of a controlling group member will be personally liable for the debts or actions of a controlled group member subject to insolvency proceedings include: whether there was active involvement in the management of the controlled group member; whether there was grievous negligence or fraud in the management of the insolvent group member; whether the management of the controlling group member could be in breach of duties of care and diligence or there was abuse of managerial power; or whether there was a direct relationship between the management of the controlled group member and its insolvency. In some jurisdictions, directors may also be found criminally liable. One of the principal difficulties with extending liability in such cases is proving the behaviour in question to show that the controlling group member was acting as a *de facto* or shadow director.

100. There are also laws that provide for a controlling group member or parent to accept liability for debts of controlled group members or subsidiaries by contract, especially where the creditors involved are banks, or by entering into voluntary cross-guarantees. Under other laws, which provide for various forms of integration of enterprise groups, the principal group member can be jointly and severally liable to the creditors of the integrated group members, for liabilities arising both before and after the formalization of the integration.

2. Contribution orders

101. A contribution order is an order by which a court can require a solvent group member to contribute specific funds to cover all or some of the debts of other group members subject to insolvency proceedings, particularly where the solvent group member had acted inappropriately towards the insolvent group member. Such inappropriate behaviour might include, for example, transferring the assets of a failing group member to another group member for an inadequate price or one group member taking the benefit of tax advantages accruing to a failing group member and leaving the creditors of the failing member to a reduced payout in a subsequent insolvency. Allowing that inappropriate behaviour to occur without a remedy could result in detriment to the creditors of the insolvent group member and a windfall to the shareholders of the solvent member.

102. Although contribution orders are not widely available under insolvency laws, a few jurisdictions have adopted or are considering adopting these measures, generally only in liquidation proceedings. A number of the issues that contribution orders are designed to address, however, may not require specific provisions to be included in the insolvency law, as remedies may already exist under other laws, such as those addressing liability and wrongful trading.

103. The most common difficulty in deciding whether to make a contribution order is balancing the interests of the shareholders and unsecured creditors of the solvent group member with the unsecured creditors of the group member in liquidation, particularly where the contribution order might affect the solvency of the former. Creditors of the solvent group member could argue that they had relied on the separate assets of that member when trading with it and should not be denied full payment of their claim because of the relationship of that solvent group member with, and behaviour towards, other group members. The difficulty of reconciling these different interests has meant that the power to make a contribution order is not commonly exercised. Courts have also taken the view that a full contribution order may be inappropriate if the effect is to threaten the solvency of the group member not already subject to insolvency proceedings, although it might be possible to order a partial contribution that is limited to certain assets, such as the balance remaining after meeting bona fide obligations.

104. Under laws that permit contribution orders, the court must take into account certain specified circumstances in considering whether to make an order. These concern the relationship between the solvent group member and the member subject to insolvency proceedings and include: the extent to which the solvent group member took part in the management of the insolvent group member; the conduct of the solvent group member towards the creditors of the insolvent member, although creditor reliance on the existence of a relationship between the group members is not sufficient grounds for making an order; the extent to which the circumstances giving rise to the insolvency proceedings are attributable to the actions of the solvent group member; the conduct of a solvent group member after commencement of insolvency proceedings with respect to the insolvent group member, particularly if that conduct indirectly or directly affects the creditors of that group member, such as through failure to perform a contract involving the insolvent group member; and such other matters as the court thinks fit.³⁴ Such an order might also be possible, for

³⁴ New Zealand Companies Act 1993, Sections 271 (1) (a) and 272 (1).

example, in cases when the subsidiary or controlled group member had incurred significant liability for personal injury or the parent or controlling group member had permitted the subsidiary or controlled group member to continue trading whilst insolvent.

3. Substantive consolidation

(a) Introduction

105. As noted above, when procedural coordination is ordered, the assets and liabilities of the debtors remain separate and distinct, with the substantive rights of claimants unaffected. Substantive consolidation, on the other hand, permits the court, in insolvency proceedings involving two or more enterprise group members, to disregard the separate identity of each group member in appropriate circumstances and consolidate their assets and liabilities, treating them as though held and incurred by a single entity. The assets are thus treated as if they were part of a single estate for the general benefit of all creditors of the consolidated group members. Only a few jurisdictions provide statutory authority for substantive consolidation orders and in those where the remedy is available, it is subject to strict evidentiary rules and is not widely used. A principal concern is that consolidation overturns the principle of the separate legal identity of each group member, which is often used to structure an enterprise group to respond to various business considerations, serving different purposes and having important implications, in terms for example of taxation law, corporate law and corporate governance rules. If the courts routinely agreed to substantive consolidation, many of the benefits to be derived from the flexibility of enterprise structure could be undermined.

106. Notwithstanding the absence of direct statutory authority or a prescribed standard for the circumstances in which substantive consolidation orders can be made, the courts of some jurisdictions have played a direct role in developing these orders and delimiting the appropriate circumstances. While this practice may reflect increased judicial recognition of the widespread use of interrelated corporate structures for taxation and business purposes, the circumstances that would support a substantive consolidation order are, nevertheless, very limited. They include situations where there is a high degree of integration of the operations and affairs of group members, through control or ownership, that would make it very difficult, if not impossible, to disentangle the assets and liabilities of the different group members to identify, for example, ownership of assets and the creditors of each group member, without expending significant time and resources that would ultimately hurt all creditors.

107. Substantive consolidation is typically discussed in the context of liquidation and the legislation that authorizes it does so only in that context. There are, however, legislative proposals that would permit substantive consolidation in the context of various types of reorganization. In jurisdictions without specific legislation, substantive consolidation orders may be available in both liquidation and reorganization, where such an order would, for example, assist the reorganization of the group. While typically requiring a court order, substantive consolidation may also be possible on the basis of consensus of the relevant interested parties. Some commentators suggest that substantive consolidation by consensus frequently occurs in cases involving enterprise groups, and often in situations where the courts would generally uphold creditor objections to

substantive consolidation if a formal application were to be made. Substantive consolidation may also be possible by way of a reorganization plan. Some laws permit a plan to include proposals for a debtor to be substantively consolidated with other group members, whether insolvent or solvent, to be included in a plan, which could be implemented if approved by the requisite vote of creditors.

108. Consolidation might be appropriate where there is no real separation between the group members, and the group structure is being maintained solely for dishonest or fraudulent purposes. A further ground that is used in some jurisdictions is where substantive consolidation leads to greater return of value for creditors, either because of the structural relationship between the group members and their conduct of business and financial relationships or because of the value of assets common to the whole group, such as intellectual property in both a process conducted across numerous group members and the product of that process.

109. The principal concerns with the availability of such orders, in addition to those associated with the fundamental issue of overturning the separate entity principle, include the potential unfairness caused to one creditor group when forced to share *pari passu* with creditors of a less solvent group member and whether the savings or benefits to the collective class of creditors outweighs incidental detriment to individual creditors. Some creditors might have relied on the separate assets or separate legal entity of a particular group member when trading with it, and should therefore not be denied a full payout because of their trading partner's relationship with another group member of which they were unaware. Other creditors might have relied upon the assets of the whole group and it would be unfair if they were limited to recovery against the assets of a single group member.

110. Because it involves pooling the assets of different group members, consolidation may not lead to increased recovery for each creditor, but rather operate to level the recoveries across all creditors, increasing the amount distributed to some at the expense of others. Additionally, the availability of consolidation may enable stronger, larger creditors to take advantage of assets that should not be available to them; encourage creditors who disagree with such an order to seek its review, thus prolonging the insolvency proceedings; and damage the certainty and enforceability of security interests (where intra-group claims disappear as a result of consolidation, creditors that have security interests in those claims would lose their rights).

111. Consolidation would generally involve the group members subject to insolvency proceedings, but in some cases and as permitted by some insolvency laws, might extend to an apparently solvent group member. This might occur when the affairs of that member were so closely intermingled with those of other group members that it would be impractical to exclude it from the consolidation, where it would be beneficial to include it in the consolidation if further investigation showed it to be actually insolvent because of the intermingling of assets or where the legal entity is a sham or involves a fraudulent scheme. When the solvent group member is to be included, the creditors of that group member may have particular concerns and a limited approach might be taken so that the consolidation order extends only to the net equity of the solvent group member in order to protect the rights of those creditors, although this approach would be difficult in cases of intermingling or fraud.

(b) Circumstances supporting consolidation

112. A number of elements have been identified as relevant to determining whether or not substantive consolidation is warranted, both in the legislation that authorizes consolidation orders and in those cases where the courts have played a role in their development. In each case, it is a question of balancing the various elements to reach a just and equitable decision; no single element is necessarily conclusive and all of the elements do not need to be present in any given case. Those elements have included: the presence of consolidated financial statements for the group; the use of a single bank account for all group members; the unity of interests and ownership between the group members; the degree of difficulty in segregating individual assets and liabilities; sharing of overhead, management, accounting and other related expenses among different group members; the existence of intra-group loans and cross-guarantees on loans; the extent to which assets were transferred or funds moved from one member to another as a matter of convenience without observing proper formalities; adequacy of capital; commingling of assets or business operations; appointment of common directors or officers and the holding of combined board meetings; a common business location; fraudulent dealings with creditors; the practice of encouraging creditors to treat the group as a single entity, creating confusion among creditors as to which of the group members they were dealing with and otherwise blurring the legal boundaries of the group members; and whether consolidation would facilitate a reorganization or is in the interests of creditors.

113. While these many factors remain relevant, some courts have begun to focus on a limited number and in particular on whether the affairs of the group members are so intermingled that separating assets and liabilities can only be achieved at extraordinary cost and expenditure of time or group members are engaged in fraudulent schemes or activity that has no legitimate business purpose. With respect to the first ground, the degree of intermingling required is hard to quantify and has been variously described by different courts as involving a degree of intermingling that was hopeless or a practical impossibility to disentangle; that would require such time and expense to disentangle the interrelationships between the group members and the ownership of assets that it would be disproportionate to the result; that was so substantial that it would threaten the realization of any net assets for the creditors; or involved an allocation of assets and liabilities between the relevant members that was essentially arbitrary and without economic reality. In reaching a decision that the degree of intermingling in a particular case justified substantive consolidation, the courts have looked at various factors, including the manner in which the group members operated and related to each other, including with respect to management and financial matters; the sufficiency of record keeping of the individual group members; the observance of proper corporate formalities; the manner in which funds and assets were transferred between the various members; and other similar factors concerning group operations.

114. The type of fraud contemplated is not fraud occurring in the daily operations of a company, but rather the total absence of a legitimate business purpose, which may relate either to the reasons for which the company was formed or, once formed, the activities it undertakes (see above, para. 97 (e)). Examples of such fraud may include transfers by a debtor of substantially all of its assets to a newly formed entity or to self-owned separate entities for the purpose of preserving and

conserving those assets for its own benefit and to hinder, delay and defraud its creditors, simulation³⁵ or Ponzi³⁶ and other such fraudulent schemes.

(c) Application for substantive consolidation

(i) Persons permitted to apply

115. An insolvency law should address the question of who may apply for substantive consolidation and at what time. With respect to the parties permitted to apply, it would seem appropriate to follow the approach of recommendation 14 concerning the parties permitted to apply for commencement of insolvency proceedings. In the group context, that would include a group member and a creditor of any such group member. In addition, it would be appropriate to permit applications by the insolvency representative of any group member, since in many instances, it will be the insolvency representative or representatives appointed to administer group members that will have the most complete information on group members and is therefore in the best position to assess the appropriateness or desirability of substantive consolidation.

116. Although in some States it might be possible for the court to act on its own initiative to order substantive consolidation, the serious impact of such an order requires that a fair and equitable process be followed and that parties in interest have the opportunity to be heard and to object to such an order, in accordance with recommendations 137-138. For that reason, it seems appropriate to draw a distinction between substantive consolidation and procedural coordination and adopt the approach that courts do not act on their own initiative with respect to substantive consolidation.

(ii) Timing of an application

117. Since the factors supporting substantive consolidation might not always be apparent or certain at the time insolvency proceedings commence, it is desirable that an insolvency law adopt a flexible approach to the issue of timing, allowing an application to be made at the same time as an application for commencement of proceedings or at any subsequent time. It should be noted, however, that the possibility of applying for substantive consolidation subsequent to commencement might be limited, in practice, by the state reached in administration of the proceedings, particularly for example, with respect to implementation of a reorganization plan. Certain key matters may already have been resolved, such as sale or disposal of assets or submission and admission of claims, or certain decisions taken and acted upon with respect to individual group members, creating practical difficulties with consolidating partly administered proceedings. In this situation, it is desirable that the order take account of the status of administration, consolidating the separate proceedings already in progress and preserving existing rights. Claims already admitted against a group member, for example, might therefore be treated as claims admitted against the consolidated estate.

³⁵ Simulation may involve contracts that either do not express the true intent of the parties and have no effect between the parties or produce different effects between the parties than those expressed in the contracts, i.e. sham contracts.

³⁶ A fraudulent investment operation that pays returns to separate investors from their own money or money paid by subsequent investors, rather than from any actual profit earned.

118. The same approach might apply to adding group members to an existing substantive consolidation. As the administration of various enterprise group members proceeds, it may become apparent that additional group members should be included because the grounds for the initial order are also satisfied with respect to those members. If the consolidation order was made with the consent of the creditors, or if creditors were given the opportunity to object to a proposed order, the addition of another group member at a later stage of the proceedings has the potential to vary the pool of assets from that originally agreed or notified to creditors. In that situation, it is desirable that creditors have a further opportunity to consent or object to the addition to the consolidation. Where substantive consolidation is ordered subsequent to a partial distribution to creditors, the introduction of a hotchpot rule might be desirable. This would help to ensure that a creditor who has received a partial distribution in respect of its claim against the single group member may not receive payment for the same claim in the consolidated proceedings, so long as the payment of the other creditors of the same class is proportionately less than the partial distribution the creditor has already received.

(d) Competing interests in consolidation

119. In addition to the competing interests of the creditors of the different group members, the interests of other stakeholders may warrant consideration in the context of consolidation, including those of creditors vis-à-vis shareholders; of the shareholders of the different group members, in particular those who are shareholders of some of the members but not of others; and of secured and priority creditors of different consolidated group members.

(i) Owners and equity holders

120. Many insolvency laws adopt the general rule that the rights of creditors outweigh those of owners and equity holders, with owners and equity holders being ranked after all other claims in the order of priority for distribution. Often this results in owners and equity holders not receiving a distribution (see part two, chap. V, para. 76). In the enterprise group context, the shareholders of some group members with many assets and few liabilities may receive a return, while the creditors of other group members with fewer assets and more liabilities may not. If the general approach of ranking shareholders behind unsecured creditors were to be extended in consolidation to all consolidated members of the group, all creditors of those group members could be paid before the shareholders of any of those group members received a distribution.

(ii) Secured creditors

121. The position of secured creditors in insolvency proceedings is discussed throughout the *Legislative Guide* (see Annex I for relevant references) and the approach adopted that, as a general principle, the effectiveness and priority of a valid security interest should be recognized and the economic value of the encumbered assets should be preserved in insolvency proceedings. That approach will also apply to the treatment of secured creditors in the enterprise group context. It is also recognized that an insolvency law may nevertheless affect the rights of

secured creditors in order to implement business and economic policies, subject to appropriate safeguards (see part two, chap. II, para. 59).

122. Questions arising with respect to substantive consolidation might include: whether a security interest over some or all of the assets of one group member could extend to include assets of another group member where a consolidation order was made or whether that security interest should be limited to the defined pool of assets upon which the secured creditor had originally relied; whether secured creditors with insufficient security could make a claim against the pooled assets as unsecured creditors; and whether internal secured creditors (i.e., creditors that are at the same time group members) should be treated differently to external secured creditors. Security interests over the whole of a debtor's estate would generally crystallize on the commencement of insolvency proceedings and the issue of that interest expanding to cover the pooled assets of all consolidated group members should not arise. To allow any secured creditor's security interest to be extended or expanded as the result of an order for substantive consolidation would improve that creditor's position at the expense of other creditors and amount to an unjust benefit or windfall, which is generally undesirable. The same point could be made with respect to employee claims.

123. One solution with respect to the treatment of external secured creditors might be to exclude them from the process of consolidation. Individual secured creditors that relied upon the separate identity of group members, such as where they relied upon an intra-group guarantee, might require special consideration. The guarantee could not be enforced where the relevant group members were subject to an order for consolidation and their individual identity disappeared. That might result in the secured creditor being treated as an unsecured creditor, unless the law permitted them to be treated as having some priority over other creditors in the substantive consolidation. Where encumbered assets are required for reorganization, a different solution might be possible, such as allowing the court to adjust the consolidation order to make specific provision for such assets or requiring the consent of the affected secured creditor. A secured creditor could surrender its security interest following consolidation, and the debt would become payable by all of the consolidated entities.

124. The interests of internal secured creditors might also need to be considered. Under some laws, those internal security interests might be extinguished, leaving the creditors with an unsecured claim, or those claims might be modified or subordinated.

(iii) Priority creditors

125. Similar questions arise with respect to the treatment of priority creditors. Practically, they might benefit or lose from the pooling of the group's assets in the same way as other unsecured creditors. Where priorities, such as those for employee benefits or tax, are based on the single entity principle, the treatment of those priorities across the group may need to be considered, especially where they interact with each other. For example, employees of a group member that has many assets and few liabilities will potentially compete with those of a group member in the opposite situation, with few assets and many liabilities, if there is consolidation. While priority creditors generally might obtain a better result at the expense of unsecured creditors without priority, the different groups of those priority creditors

might have to adjust any expectations they may have as a result of their priority position with respect to the assets of a single entity. Where there is intermingling of assets so that it is not possible to determine who owns what assets, it may be very difficult to quantify the priorities and determine how much might be available to settle each priority claim. Accordingly, although it is desirable that the priorities established under the insolvency law with respect to each individual debtor be recognized where that debtor is subject to substantive consolidation, it might not always be possible to give them full effect.

(e) Notification of creditors

126. An application for substantive consolidation may be subject to the same requirements for giving notice as an application for commencement of proceedings (see part two, chap. I, paras. 64-71 and recommendations 19 (a), 22-25). When made at the same time as the application for commencement of proceedings, only an application for substantive consolidation by creditors would require notice to be given to the relevant debtors, consistent with recommendation 19. An application by group members made at the same time as the application for commencement would not require creditors to be notified under recommendations 22 and 23, which do not mandate notification of an application for commencement of insolvency proceedings to the creditors of the concerned entity.

127. The potential impact of substantive consolidation on creditor rights suggests that affected creditors should have the right to be notified of any order for consolidation made at the time of commencement and have the right to appeal, consistent with recommendation 138. One issue to be considered in that situation is whether a single objection would be sufficient to prevent consolidation from occurring. It may be possible, for example, to provide objecting creditors who will be significantly disadvantaged by the consolidation relative to other creditors with a greater level of return than other unsecured creditors, thus departing from the strict policy of equal distribution. It may also be possible to exclude specific groups of creditors with certain types of contracts, for example, limited recourse project financing arrangements entered into with clearly identified group members at arm's length commercial terms.

128. Where the application is made by creditors after proceedings have commenced, it might be desirable for notice of the application to be given to insolvency representatives of the entities to be consolidated. Notice should be given in an effective and timely manner in the form determined by domestic law.

(f) Effect of an order for substantive consolidation

129. The insolvency law should establish the effects of an order for substantive consolidation. These might include: treatment of the assets and liabilities of the substantively consolidated group members as if they were part of a single insolvency estate; the extinguishment of intra-group claims; treatment of claims against the individual group members to be substantively consolidated as if they were claims against the substantively consolidated estate; and recognition of priorities established against the individual group members as priorities against the substantively consolidated estate (to the extent possible, given the difficulty noted above). Intra-group claims would generally disappear on consolidation on the basis

that the claim and the obligation to pay belong or are owed by the same insolvency estate, and therefore effectively cancel each other out.

(i) Avoidance of transactions involving group members subject to consolidation

130. Where group members are substantively consolidated, there will be a practical difficulty in seeking to avoid transactions between substantively consolidated group members, since the assets to be recovered and the estate for which they would be recovered will be treated as part of the same substantively consolidated estate. However, transactions between a substantively consolidated group member and other members of the group or an external party would be subject to avoidance under the usual avoidance rules, including any rules concerning calculation of the suspect period where substantive consolidation is ordered. Where those transactions can be avoided and assets or value recovered, that recovery will be for the benefit of the substantively consolidated estate.

(ii) Calculation of the suspect period

131. Where substantive consolidation is ordered after the commencement of proceedings or where group members are added to a substantive consolidation at different times, the choice of the date from which the suspect period for the purposes of avoidance (see part two, chap. II, paras. 188-191 and recommendation 89) would be calculated may need to be considered to provide certainty for lenders and other third parties. The issue may become more important as the period of time between an application for or commencement of individual insolvency proceedings and the order for substantive consolidation increases. Choosing the date of the order for substantive consolidation for calculation of the suspect period for avoidance purposes may create problems with respect to transactions entered into between the date of application for or commencement of insolvency proceedings for individual group members and the date of the substantive consolidation. One approach might be to calculate that date in accordance with recommendation 89. That approach might result in a different date for each group member subject to the consolidation order, which might in practice be cumbersome to implement. Another approach might be to establish a common date by reference to the earliest date on which an application for commencement was made or insolvency proceedings with respect to those group members to be consolidated commenced. In either case, it is desirable that the date be specified in the insolvency law to ensure transparency and predictability.

(iii) Reorganization

132. With respect to the impact of substantive consolidation on reorganization, the liquidation value for the purposes of recommendation 152 (b), would be the liquidation value of the substantively consolidated estate, and not the liquidation value of the individual members before substantive consolidation. An order for substantive consolidation might also combine the creditors for the purposes of voting on any reorganization plan for the consolidated group members. Where creditor meetings are required to be held subsequent to an order for substantive consolidation, following commencement of proceedings, all creditors of the consolidated group members would be eligible to attend.

(iv) Treatment of guarantees

133. Guarantees involving group members might be affected in several ways by an order for substantive consolidation. A guarantee may have been provided by one group member to another group member. Both may be subject to the order for substantive consolidation or the guarantor may not be subject to that order. In the first situation, the guarantee and any associated claims would be extinguished as an intra-group claim. The second situation might be addressed by provisions in the insolvency law on related person transactions (see part two, chap. V, para. 48). A guarantee might also have been provided by an external guarantor to a group member that is subject to the substantive consolidation. Unless specifically addressed in the insolvency law, this situation would be subject to treatment under domestic law, which might restrict the guarantor's claim where it had made a payment under the guarantee. A guarantee might also have been provided to an external lender by one group member to secure finance provided to another, where both group members become subject to consolidation. As noted above, where enforcement of the guarantee relies upon the separate identity of the group members, the external lender is likely to be treated as an unsecured creditor unless the insolvency law permits them to be treated as retaining some priority over other creditors of the consolidated group members.

(g) Modification of an order for substantive consolidation

134. Although modification of an order for substantive consolidation might not always be possible or desirable, given the substantive effect of that order, there may be cases where circumstantial changes or the availability of new information indicate the desirability of modifying the original order. Any such modification should be subject to the condition that any vested rights or interests arising pursuant to the initial order should not be unjustly affected by the order for modification. Those rights or interests, whether arising by decision of the court or the insolvency representative, may relate to sales of assets and provision of finance to group members.

(h) Exclusions from an order for substantive consolidation

135. Some laws make provision for what may be termed an order for partial or limited substantive consolidation, that is, an order for substantive consolidation that excludes certain assets or claims.

136. Generally, these exclusions will be rare, given the assumption in favour of substantive consolidation where the requirement for intermingling or a fraudulent scheme is met. However, there may be circumstances where exclusion may be justified. Those circumstances might include where the ownership of certain specific assets could readily be identified or part of the business activities of the consolidated group members could be separated because it was not involved in the fraudulent scheme, where including certain assets in an order for substantive consolidation might exacerbate the consequences of a fraudulent scheme, or where the assets were burdensome, such as assets carrying an environmental liability or assets that would be difficult or costly to administer (see part two, chap. II, para. 88). Claims associated with excluded assets would go with the asset. consolidation might also be limited, for example, to unsecured creditors, thereby excluding external secured creditors, who might be free to enforce their security interests

(unless those security interests depend upon the separate identity of the group members to be consolidated). Another approach excludes certain assets from substantive consolidation if otherwise creditors would be unfairly prejudiced, although this ground is unlikely to be relevant in cases of intermingling or fraud.

(i) Competent court

137. The issues discussed above with respect to both joint applications and procedural coordination would apply also with respect to the court competent to order substantive consolidation (see above, paras. 17-19 and recommendation 209).

Recommendations 219-231

Purpose of legislative provisions

The purpose of provisions on substantive consolidation is:

(a) To provide legislative authority for substantive consolidation, while respecting the basic principle of the separate legal identity of each enterprise group member;

(b) To specify the very limited circumstances in which the remedy of substantive consolidation may be available in order to ensure transparency and predictability; and

(c) To specify the effect of an order for substantive consolidation, including the treatment of security interests.

Contents of legislative provisions

The principle of separate legal identity (para. 105)

219. The insolvency law should respect the separate legal identity of each enterprise group member. Exceptions to that general principle should be limited to the grounds set forth in recommendation 220.

Circumstances in which substantive consolidation may be available (paras. 106, 112-114)

220. The insolvency law may specify that, at the request of a person permitted to make an application under recommendation 223, the court may order substantive consolidation with respect to two or more enterprise group members only in the following limited circumstances:

(a) Where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or

(b) Where the court is satisfied that enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential to rectify that scheme or activity.

Exclusions from substantive consolidation (paras. 135-136)

221. Where the insolvency law provides for substantive consolidation in accordance with recommendation 220, the insolvency law should permit the court to exclude specified assets and claims from an order for substantive consolidation and specify the circumstances in which those exclusions might be ordered.

Application for substantive consolidation

— *Timing of application (paras. 117-118)*

222. The insolvency law should specify that an application for substantive consolidation may be made at the same time as an application for commencement of insolvency proceedings with respect to enterprise group members or at any subsequent time.³⁷

— *Persons permitted to apply (paras. 115-116)*

223. The insolvency law should specify the persons permitted to make an application for substantive consolidation, which may include an enterprise group member and a creditor or the insolvency representative of any such enterprise group member.

Effect of an order for substantive consolidation (129-133)

224. The insolvency law should specify that an order for substantive consolidation has the following effects:³⁸

- (a) The assets and liabilities of the consolidated group members are treated as if they were part of a single insolvency estate;
- (b) Claims and debts between group members included in the order are extinguished; and
- (c) Claims against group members included in the order are treated as if they were claims against the single insolvency estate.

Treatment of security interests in substantive consolidation (paras. 121-124)

225. The insolvency law should specify that the rights and priorities of a creditor holding a security interest over an asset of an enterprise group member subject to an order for substantive consolidation should, as far as possible, be respected in substantive consolidation, unless:

- (a) The secured indebtedness is owed solely between enterprise group members and is extinguished by an order for substantive consolidation;
- (b) It is determined that the security interest was obtained by fraud in which the creditor participated; or
- (c) The transaction granting the security interest is subject to avoidance in accordance with recommendations 87, 88 and 217.

³⁷ The possibility of ordering substantive consolidation at an advanced stage of the insolvency proceedings is discussed in the commentary, see above, paras. 117-118.

³⁸ The effect on security interests is addressed in recommendation 225 and paras. 121-124.

Recognition of priorities in substantive consolidation (para. 125)

226. The insolvency law should specify that the priorities established under insolvency law and applicable to individual enterprise group members prior to an order for substantive consolidation should, as far as possible, be recognized in substantive consolidation.

Meetings of creditors (para. 132)

227. The insolvency law should specify that, to the extent a meeting of creditors is required by the law to be held subsequent to an order for substantive consolidation, creditors of all consolidated group members are eligible to attend.

Calculation of the suspect period in substantive consolidation (paras. 130-131)

228. (1) The insolvency law should specify the date from which the suspect period with respect to avoidance of transactions of the type referred to in recommendation 87 should be calculated when substantive consolidation is ordered with respect to two or more enterprise group members.

(2) The specified date from which the suspect period is calculated retrospectively in accordance with recommendation 89 may be:

(a) A different date for each enterprise group member included in the substantive consolidation, being either the date of application for or commencement of insolvency proceedings with respect to each such group member; or

(b) A common date for all enterprise group members included in the substantive consolidation, being either (i) the earliest of the dates of application for, or commencement of, insolvency proceedings with respect to those group members; or (ii) the date on which all applications for commencement were made or all proceedings commenced.

Modification of an order for substantive consolidation (para. 134)

229. The insolvency law should specify that an order for substantive consolidation may be modified, provided that any actions or decisions already taken pursuant to the order are not affected by the modification.³⁹

Competent court (para. 137)

230. For the purposes of recommendation 13, the words “commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings” include an application or order for substantive consolidation, including modification of that order.⁴⁰

³⁹ It is not intended that use of the term “modification” would include termination of an order for substantive consolidation.

⁴⁰ The criteria that might be relevant to determining the competent court are discussed above, para. 18.

Notice of substantive consolidation (paras. 126-128)

231. The insolvency law should establish requirements for giving notice with respect to applications and orders for substantive consolidation and for modification of substantive consolidation, including the scope and extent of the order; the parties to whom notice should be given; the party responsible for giving notice; and the content of the notice.

E. Participants

1. Appointment of an insolvency representative

138. The appointment and role of the insolvency representative are discussed above (see part two, chap. III, paras. 36-74). The issues discussed, together with recommendations 115-125, would generally apply in the enterprise group context.

(a) Coordination of proceedings

139. When multiple proceedings commence with respect to group members, an order for procedural coordination may or may not be made, but in either case, coordination of those proceedings may be facilitated if the insolvency law was to include specific provisions promoting coordination, along the lines of articles 25 and 26 of the UNCITRAL Model Law, and indicating how it might be achieved, along the lines of article 27 of the Model Law. That approach could be adopted with respect to coordination between the different courts involved in administering proceedings for different group members and between the different insolvency representatives appointed in those proceedings, including those appointed on an interim basis.⁴¹ The obligations of an insolvency representative, specifically, recommendations 111, 116-117, and 120, might be extended in the group context to include various aspects of coordination, including: sharing and disclosure of information; approval or implementation of agreements with respect to division of the exercise of powers and allocation of responsibilities between insolvency representatives; cooperation on use and disposal of assets, the proposal and negotiation of coordinated reorganization plans (unless preparation of a single group plan is possible as discussed below), the use of avoidance powers, obtaining of post-commencement finance, submission and admission of claims and distributions to creditors. The insolvency law could also address timely resolution of disputes between the different insolvency representatives appointed.

140. Where a number of insolvency representatives are appointed to the different proceedings concerning group members, the insolvency law may permit one of them to take a leading role in coordinating those proceedings. That representative could be, for example, the representative of the parent or controlling group member if it is subject to the insolvency proceedings. While such a leading role might reflect the economic reality or structure of the enterprise group, equality under the law of all insolvency representatives should be preserved. Coordination under the leadership of one insolvency representative may also be achieved on a voluntary basis, to the extent possible under applicable law. Notwithstanding such arrangements for

⁴¹ The glossary explains that “insolvency representative” includes one appointed on an interim basis.

cooperation and coordination, each insolvency representative would remain responsible for meeting their obligations under the law of the jurisdiction in which they were appointed; such arrangements cannot be used to diminish or remove those obligations.

141. In certain jurisdictions, courts, rather than insolvency representatives, may have the principal authority to coordinate insolvency proceedings. When the insolvency law so provides, and different courts are involved in administering proceedings for different group members, it is desirable that the provisions concerning coordination of proceedings apply also to the courts and that they have powers along the lines of article 27 of the UNCITRAL Model Law.

(b) Appointment of a single or the same insolvency representative

142. Coordination of multiple proceedings might also be facilitated by the appointment of a single or the same insolvency representative to administer the different group members subject to insolvency. In practice, it might be possible to appoint one insolvency representative to administer multiple proceedings or it might be necessary to appoint the same insolvency representative to each of the proceedings to be coordinated, depending upon procedural requirements and the number of courts involved. Although the administration of each of the group members would remain separate (as in the case of procedural coordination), such an appointment could help to ensure coordination of the administration of the various group members, reduce related costs and delays and facilitate the gathering of information on the group as a whole. With respect to the latter point, care might need to be exercised in how that information is treated, ensuring in particular that confidentiality requirements with respect to separate group members are observed. While many insolvency laws do not address the question of appointing a single insolvency representative, there are some jurisdictions where such an appointment in the group context has become a practice. This has also been achieved to a limited extent in some cross-border insolvency cases, where insolvency representatives from the same international firm have been appointed in the different jurisdictions.⁴²

143. In deciding whether it is appropriate to appoint a single or the same insolvency representative, the nature of the group, including the level of integration of the members and its business structure, need to be considered. In addition, it is highly desirable that any person to be appointed in that capacity has the appropriate experience and knowledge as noted above (part two, chap. III, para. 39) and that that knowledge and experience be carefully scrutinized before the appointment is made to ensure it is appropriate to the group members concerned. It is desirable that a single or the same insolvency representative only be appointed to administer two or more group members where it will be in the interests of the insolvency proceedings to do so.

144. Where a single or the same insolvency representative is appointed to administer several members of a group with complex financial and business relationships and different groups of creditors, there is the potential for loss of neutrality and independence. Conflicts of interest may arise, for example, with respect to cross-guarantees, intra-group claims and debts, post-commencement

⁴² See UNCITRAL Practice Guide, chap. III, para. 10 (j).

finance, lodging and verification of claims or the wrongdoing by one group member with respect to another group member. The obligation to disclose potential or existing conflicts of interest contained in recommendations 116 and 117 would be relevant to the group context. As a safeguard against possible conflicts, the insolvency representative could be required to provide an undertaking or be subject to a practice rule or statutory obligation to seek direction from the court. Additionally, the insolvency law could provide for the appointment of one or more further insolvency representatives to administer the entities in conflict. That appointment might relate to the specific area of conflict, with the appointment being limited to its resolution, or be more general and for the duration of the proceedings.

(c) Debtor in possession

145. When the insolvency law permits the debtor to remain in possession of the business, and no insolvency representative is appointed, special consideration may be required to determine how multiple proceedings should be coordinated and the extent to which the obligations applicable to the insolvency representative, including any additional obligations referred to above, will apply to the debtor in possession (see part two, chap. III, paras. 16-18). To the extent that the debtor in possession performs the functions of an insolvency representative, consideration might also be given to how provisions of an insolvency law permitting the appointment of a single or the same insolvency representative or one of several insolvency representatives to take a lead role in coordinating proceedings might apply to the debtor in possession context.

Recommendations 232-236

Purpose of legislative provisions

The purpose of provisions on appointment of insolvency representatives in an enterprise group context is:

(a) To permit appointment of a single or the same insolvency representative to facilitate coordination of insolvency proceedings commenced with respect to two or more enterprise group members; and

(b) To encourage cooperation where two or more insolvency representatives are appointed, with a view to avoiding duplication of effort; facilitating gathering of information on the financial and business affairs of the enterprise group as a whole; and reducing costs.

Contents of legislative provisions

Appointment of a single or the same insolvency representative (paras. 142-144)

232. The insolvency law should specify that, where it is determined to be in the best interests of the administration of the insolvency proceedings with respect to two or more enterprise group members, a single or the same insolvency representative may be appointed to administer those proceedings.⁴³

⁴³ Although recommendation 118 addresses selection and appointment of the insolvency representative, it does not recommend appointment by any particular authority, but leaves it up to the insolvency law. The same approach would apply in the enterprise group context.

Conflict of interest (para. 144)

233. The insolvency law should specify measures to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members. Such measures may include the appointment of one or more additional insolvency representatives.

Cooperation between two or more insolvency representatives (paras. 139-140)

234. The insolvency law may specify that when different insolvency representatives are appointed to administer insolvency proceedings with respect to two or more enterprise group members, those insolvency representatives should cooperate with each other to the maximum extent possible.⁴⁴

Cooperation between two or more insolvency representatives in procedural coordination (paras. 139-140)

235. The insolvency law should specify that, when more than one insolvency representative is appointed to administer insolvency proceedings that are subject to procedural coordination, those insolvency representatives should cooperate with each other to the maximum extent possible.

Cooperation to the maximum extent possible between insolvency representatives (paras. 139-140)

236. The insolvency law should specify that the cooperation to the maximum extent possible between insolvency representatives be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning the enterprise group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information;

(b) Approval or implementation of agreements with respect to allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating role;

(c) Coordination with respect to administration and supervision of the affairs of the group members subject to insolvency proceedings, including day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; exercise of avoidance powers; communication with creditors and meetings of creditors; submission and admission of claims, including intra-group claims; and distributions to creditors; and

(d) Coordination with respect to the proposal and negotiation of reorganization plans.

⁴⁴ In addition to the provisions of the insolvency law with respect to cooperation and coordination, the court generally may indicate measures to be taken to that end in the course of administration of the proceedings.

F. Reorganization of two or more enterprise group members

146. Recommendations 139-159 address issues specific to the preparation, proposal, content, approval and implementation of a reorganization plan. In general, those recommendations will be applicable in the context of an enterprise group.

1. Coordinated reorganization plans

147. When reorganization proceedings commence with respect to two or more enterprise group members, irrespective of whether or not those proceedings are to be procedurally coordinated, one issue not addressed elsewhere in the *Legislative Guide* is whether it will be possible to reorganize the debtors through a single reorganization plan covering several members or through coordinated, substantially similar plans for each member. Such plans have the potential to deliver savings across the group's insolvency proceedings, ensure a coordinated approach to the resolution of the group's financial difficulties and maximize value for creditors. Although several insolvency laws permit the negotiation of a single reorganization plan, under some laws this approach is only possible where the proceedings are procedurally coordinated or substantively consolidated, while under other laws it would generally only be possible where the proceedings could be coordinated on a voluntary basis.

148. In practice, the concept of a single reorganization plan or coordinated plans would require the same or a similar reorganization plan to be prepared and approved in each of the proceedings concerning group members covered by the plan. Approval of such a plan would be considered on a member-by-member basis with the creditors of each group member voting in accordance with the voting requirements applicable to a plan for a single debtor; it would not be desirable to consider approval on a group basis and allow the majority of creditors of the majority of members to compel approval of a plan for all members. The process for preparation of the plan and solicitation of approval should take into account the need for all group members to approve the plan and it would accordingly need to address the benefits to be derived from such approval and the information required to obtain that approval. Those issues would be covered by recommendations 143 and 144 concerning content of the plan and the accompanying disclosure statement. Additional details that could relevantly be disclosed in the group context might include details with respect to group operations, the linkages between group members, the position in the group of each member covered by the plan and functioning of the group as such.

149. Such a reorganization plan or plans would need to take into account the different interests of the different groups of creditors, including the possibility that providing varying rates of return for the creditors of different group members might be desirable in certain circumstances. Achieving an appropriate balance between the rights of different groups of creditors with respect to approval of the plan, including appropriate majorities, both among the creditors of a single group member and between creditors of different group members is also desirable. Classification of claims and classes of creditors also needs to be considered, as does voting of creditors and approval of a plan, particularly when group members are creditors of each other and therefore "related persons". Calculation of applicable majorities in the group context may require consideration of how creditors with the same claim

against different group members should be counted for voting purposes, particularly where the claims may have different priorities. Some consideration may also need to be given to whether rejection by the creditors of one of several group members might prevent approval of the plan across the group and the consequences of that rejection. One approach might be based upon provisions applicable to the approval of a reorganization plan for a single debtor. Another approach might be to devise different majority requirements that are specifically designed to facilitate approval in the group context. Safeguards analogous to those in recommendation 152 could also be included, with an additional requirement that the plans should be fair as between the creditors of different group members.

150. In the group context, a related person includes a person who is or has been in a position of control of the debtor or a parent, subsidiary or affiliate of the debtor (see glossary, (jj)). Voting by related persons on approval of the plan is discussed above (see part two, chap. IV, para. 46) and it is noted that although some insolvency laws restrict the ability of related persons to vote in various ways, most insolvency laws do not specifically address the issue. It should be noted that where the insolvency law includes such restrictions, they might cause difficulty in some groups when a particular member has only creditors classified as related persons or a very limited number of creditors who are not related persons.

151. An insolvency law might also include provisions addressing the consequences of failure to approve such a reorganization plan as addressed by recommendation 158. One law, for example, provides that the consequence of failure to approve a plan is the liquidation of all insolvent group members. Where solvent members participated in the plan by consent, special provisions may be required to prevent undue advantages or disadvantages arising from that liquidation.

2. Inclusion of a solvent group member in a reorganization plan

152. Paragraphs 11-15 above discuss the possibility of including a solvent group member in an application for commencement of proceedings. It is noted that an apparently solvent member may, on further investigation, satisfy the commencement standard of imminent insolvency and thus be covered, for commencement purposes, by recommendation 15. That situation may not be uncommon in an enterprise group where the insolvency of some members leads almost inevitably to the insolvency of others. Where imminent insolvency is not an issue, however, a solvent group member generally could not participate in a reorganization plan for other members of the same group subject to insolvency proceedings under the insolvency law. There may, however, be circumstances in which different levels of participation by a solvent member in a reorganization plan might be both appropriate and feasible, on a voluntary basis. Such participation by solvent group members is, in fact, not unusual in practice. The solvent group member could thus aid the reorganization of other enterprise group members and would be contractually bound by the plan once it were approved and, where required, confirmed. The decision of a solvent group member to participate in a reorganization plan would be an ordinary business decision of that member, and the consent of creditors would not be necessary unless required by applicable company law. With respect to any disclosure statement accompanying a plan that included a solvent group member, caution would need to be exercised in disclosing information relating to that solvent group member and its business affairs.

Recommendations 237-238

Purpose of legislative provisions

The purpose of provisions relating to reorganization plans in an enterprise group context is:

(a) To facilitate the coordinated reorganization of the businesses of enterprise group members subject to the insolvency law, thereby preserving employment and, in appropriate cases, protecting investment; and

(b) To facilitate the negotiation and proposal of coordinated reorganization plans in insolvency proceedings with respect to two or more enterprise group members.

Contents of legislative provisions

Coordinated reorganization plans (paras. 147-151)

237. The insolvency law should permit coordinated reorganization plans to be proposed in insolvency proceedings with respect to two or more enterprise group members.

Including a solvent group member in a reorganization plan for an insolvent group member (para. 152)

238. The insolvency law should specify that an enterprise group member that is not subject to insolvency proceedings may voluntarily participate in a reorganization plan proposed for one or more enterprise group members subject to insolvency proceedings.

III. Addressing the insolvency of enterprise groups: International issues

A. Introduction

1. The introduction to the UNCITRAL Practice Guide ⁴⁵ notes that although the number of cross-border insolvency cases has increased significantly since the 1990s, the adoption of legal regimes, either domestic or international, equipped to address cases of a cross-border nature has not kept pace. The lack of such regimes has often resulted in inadequate and uncoordinated approaches that have not only hampered the rescue of financially troubled businesses and the fair and efficient administration of cross-border insolvencies, but also impeded the protection and maximization of the value of the assets of the insolvent debtor and are unpredictable in their application. Moreover, the disparities in and, in some cases, conflicts between national laws have created unnecessary obstacles to the achievement of the basic economic and social goals of insolvency proceedings. There has often been a lack of transparency, with no clear rules on recognition of the rights and priorities of existing creditors, the treatment of foreign creditors and the law that will be applicable to cross-border issues. While many of these inadequacies are also apparent in domestic insolvency regimes, their impact is potentially much greater in cross-border cases, particularly where reorganization is the goal.

2. In addition to the inadequacy of existing laws, the absence of predictability as to their application in practice and associated cost and delay has added a further layer of uncertainty that can impact upon capital flows and cross-border investment. Acceptance of different types of proceedings, understanding of key concepts and the treatment accorded to parties with an interest in insolvency proceedings differ. Reorganization or rescue procedures, for example, are more prevalent in some countries than others. The involvement of, and treatment accorded to, secured creditors in insolvency proceedings varies widely. Different countries also recognize different types of proceedings with different effects. An example in the context of reorganization proceedings is the cases in which the law of one State envisages a debtor in possession continuing to exercise management functions, while under the law of another State in which contemporaneous insolvency proceedings are being conducted with respect to the same debtor existing management will be displaced or the debtor's business liquidated. Many national insolvency laws have claimed, for their own insolvency proceedings, application of the principle of universality, with the objective of a unified proceeding where court orders would be effective with respect to assets located abroad. At the same time, those laws do not accord recognition to universality claimed by foreign insolvency proceedings. In addition to differences between key concepts and treatment of participants, some of the effects of insolvency proceedings, such as the application of a stay or suspension of actions against the debtor or its assets, regarded as a key element of many laws, cannot be applied effectively across borders.

3. In the international context, the models that have been created to address cross-border insolvency issues have always stopped short of dealing satisfactorily

⁴⁵ Adopted by the Commission on 1 July 2009. The text is available at <http://www.uncitral.org>.

with enterprise groups. When the United Kingdom's House of Lords considered whether the United Kingdom should subscribe to the European Convention on Insolvency Proceedings, the committee commented on the failure of the convention to deal with groups of companies — the most common form of business model. When the convention became the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation), it still did not address the issue. When the text of what became the UNCITRAL Model Law was debated, groups were regarded as “a stage too far”.

4. Many cases illustrate the key problem with respect to groups in the international context. Where business is conducted through group members in a number of different States in an integrated manner, such as in communications groups like KPNQwest group⁴⁶ or Nortel Networks Corporation, manufacturing groups such as Federal Mogul Global Inc or financial services companies such as Lehman Brothers Holdings Inc., widespread failure is likely to result in commencement of a number, sometimes a very large number, of separate insolvency proceedings in different jurisdictions with respect to each of the insolvent group members. Unless those proceedings can be coordinated, it is unlikely that the group can be reorganized as a whole and may have to be broken up into its constituent parts. The interrelationships between group members that determine the manner in which the group is structured and operates whilst solvent are generally severed on insolvency. There is often a clear tension between the traditional separate legal entity approach to corporate regulation and its implications for insolvency and the facilitation of insolvency proceedings concerning a group or part of a group in a cross-border situation in a manner that would enable the goal of maximizing value for the benefit of all creditors to be achieved. The history of cross-border insolvency since the Maxwell case in 1991⁴⁷ underscores the problems encountered in managing numbers of parallel proceedings, and the need for the creative solutions that have been developed and adopted. Some of these solutions are discussed in the UNCITRAL Practice Guide,⁴⁸ but the development of a legislative regime to address the cross-border insolvency of enterprise groups remains a challenge to be met.

5. There has been considerable discussion in recent times as to what might form the basis of a legal regime to address the cross-border insolvency of enterprise groups. Some suggestions have included adapting the concept of “centre of main interests” as it applies to an individual debtor to apply to an enterprise group, enabling all proceedings with respect to group members to be commenced in, and administered from, a single centre through one court and subject to a single governing law. Another suggestion has been to identify a coordination centre for the

⁴⁶ KPNQwest was a telecoms group that owned and operated a fibre-optic cable network around Europe and to the United States. The main cables were in rings: for the ring around Europe, the French part of the ring was owned by a French subsidiary; the German part by a German subsidiary, and so on. When the Dutch parent failed, many of the subsidiaries were obliged to file for the protection of the court in the jurisdictions in which they were incorporated. No one was able to coordinate the proceedings and it was effectively broken up.

⁴⁷ Maxwell Communication Corporation plc: United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of Justice, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991) (England).

⁴⁸ See UNCITRAL Practice Guide, chapters II and III.

group, which might be determined by reference to the location of the controlling member of the group or to permit group members to apply for insolvency in the State in which proceedings have commenced with respect to the insolvent parent of the group.⁴⁹

6. These proposals raise significant and difficult issues. Some relate to the very nature of multinational enterprise groups and how they operate — how to define what constitutes an enterprise group for insolvency purposes and identify the factors that might be appropriate to determining where the group centre is located, assuming that there is only one centre for each group — as well as to questions of jurisdiction over the constituent members of the group, eligibility to commence insolvency proceedings and applicable law. Others relate to the challenge of reaching broad international agreement on these issues in order to achieve a consistently, widely applied and, possibly, binding solution that will deliver certainty and predictability to the cross-border insolvency of enterprise groups.

B. Promoting cross-border cooperation in enterprise group insolvencies

1. Introduction

7. The first step in finding a solution to the problem of how to facilitate the global treatment of enterprise groups in insolvency might be to ensure that existing principles for cross-border cooperation apply to enterprise group insolvencies. Cooperation between courts and insolvency representatives in insolvency proceedings involving multinational enterprise groups may help to facilitate commercial predictability and increase certainty for trade and commerce, as well as fair and efficient administration of proceedings that protects the interests of the parties, maximizes the value of the assets of group members to preserve employment and minimizes costs. Although there are enterprise groups where separate insolvency proceedings may be a feasible option because there is a low degree of integration in the group and group members are relatively independent of each other, for many groups cooperation may be the only way to reduce the risk of piecemeal insolvency proceedings that have the potential to destroy going concern value and lead to asset ring-fencing, as well as asset shifting or forum shopping by debtors.

8. A widespread limitation on cooperation between courts and insolvency representatives from different jurisdictions in cases of cross-border insolvencies derives from the lack of a legislative framework, or from uncertainty regarding the scope of any existing legislative authorization, for pursuing cooperation with foreign courts and insolvency representatives.⁵⁰ The UNCITRAL Model Law provides that legislative framework, addressing issues of access to foreign courts, recognition of foreign insolvency proceedings and authorizing cross-border

⁴⁹ These issues are discussed in some detail in the working papers of UNCITRAL Working Group V (Insolvency law) – see A/CN.9/WG.V/WP.85/Add.1, paras. 3-12; A/CN.9/WG.V/WP.82/Add.4, paras. 3-15; A/CN.9/WG.V/WP.76/Add.2, paras. 2-17; A/CN.9/WG.V/WP.74/Add.2, paras. 6-12, available online at http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html.

⁵⁰ UNCITRAL Practice Guide, p17 and following.

cooperation and communication between courts, between courts and insolvency representatives and between insolvency representatives.⁵¹

9. However, since the provisions of the UNCITRAL Model Law focus on individual debtors, albeit with assets in different States, they have limited application to enterprise groups with multiple debtors in different States. A key difference in enterprise group insolvencies is that the court in one jurisdiction is not necessarily dealing with the same debtor as the court in another jurisdiction (although there may be a common debtor in the case of individual group members that have assets in different States, a situation within the scope of the Model Law). The link between parallel proceedings is not a common debtor, but rather that the debtors are all members of the same enterprise group. Unless the existence (and possibly the extent) of that group is or can be recognized under national law, each proceeding will appear to be unconnected to each other proceeding and cooperation will appear to be unwarranted on the basis that it might interfere with the independence of local courts or be deemed unnecessary because each proceeding is, essentially, a national proceeding. While it may be possible in some instances to treat each group member entirely separately, for many enterprise groups the best result for each of the different members may be achieved through a more widely-based and potentially global solution that reflects the manner in which the group conducted its business before the onset of insolvency and addresses either distinct business units or the enterprise group as a whole, particularly where the business is closely integrated.

10. For these reasons, it is desirable that an insolvency law recognize the existence of enterprise groups and the need, with respect to cross-border cooperation, for courts to cooperate with other courts and with insolvency representatives, not just with respect to insolvency proceedings concerning the same debtor, but also with respect to different members of an enterprise group.

2. Access to courts and recognition of foreign insolvency proceedings

11. The current rules and practices on cross-border assistance and cooperation in insolvency matters are rather diverse, including those rules relating to access to the courts and the recognition of foreign proceedings. In many States, some form of recognition of the foreign proceeding is a prerequisite to further assistance and cooperation. To achieve that recognition, those seeking assistance and cooperation, whether the insolvency representative or creditors, generally require standing to make an application to the foreign court. That application might relate to assistance with respect to a stay of proceedings, examination of witnesses and other matters included in articles 20 and 21 of the UNCITRAL Model Law. The work undertaken in preparation of the Model Law highlighted the widespread absence of domestic laws addressing these issues and the different approaches taken in the laws that had been enacted. To achieve a uniform approach, the Model Law provides the legislative framework for access to courts and recognition of foreign proceedings, establishing appropriate conditions to ensure expedited and direct access (articles 9-14), the criteria for determining whether foreign proceedings are proceedings that qualify for recognition and the effects of recognition (articles 15-24). Although the Model Law has limited application in the enterprise group context, it is desirable

⁵¹ Id., chap. I, paras. 9-16 provides an introduction to the Model Law.

that the access to courts and recognition of foreign proceedings it provides with respect to individual debtors also be provided with respect to insolvency proceedings involving members of the same enterprise group.

12. It should be noted that cooperation between a court and a foreign court or foreign representatives as envisaged under the UNCITRAL Model Law does not require a previous formal decision to recognize the foreign proceeding, encouraging cooperation from the earliest time in the proceedings.⁵²

13. In States where access and recognition are not required to facilitate cooperation, further legislation may not be required. However, the existence of such provisions may not be sufficient, as available mechanisms may be cumbersome, costly and time-consuming. Only where access and recognition are readily available in a timely manner is it likely that effective cooperation with respect to the administration of proceedings concerning multinational groups can be achieved.

Recommendation 239

Purpose of legislative provisions

The purpose of provisions on access and recognition of foreign insolvency proceedings with respect to enterprise group members is to ensure that, access and recognition are available under applicable law.

Contents of legislative provisions

Access to courts and recognition of foreign proceedings

239. The insolvency law should provide, in the context of insolvency proceedings with respect to enterprise group members,

- (a) Access to the courts for foreign representatives and creditors; and
- (b) Recognition of the foreign proceedings, if necessary under applicable law.

C. Forms of cooperation involving courts

14. Cooperation in cross-border insolvencies may take different forms and may include, as suggested in article 27 of the UNCITRAL Model Law, communication between the courts, between the courts and insolvency representatives and between the insolvency representatives, as well as the use of cross-border insolvency agreements, coordination of hearings, and coordination of the supervision and administration of the debtor's affairs. In the context of a single debtor, authorization for cooperation is provided by articles 25 and 26 of the Model Law. Article 25 authorizes the court to cooperate to the maximum extent possible with foreign courts, while article 26 authorizes an insolvency representative, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign courts and representatives. The issue of cooperation is also addressed, within the European Union, by the EC Insolvency Regulation. Recital 20 notes that in the context of main and secondary proceedings the

⁵² Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, para. 177.

liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. The liquidator in the main proceedings should have the ability to intervene in the non-main proceedings and to propose a reorganization plan or apply for suspension of the realization of assets in those proceedings. Article 31 of the EC Regulation establishes a duty of liquidators in main and non-main proceedings to communicate information, particularly information that may be relevant to the other proceedings and relates to progress made with respect to the submission and verification of claims and measures aimed at terminating the proceedings. Neither the UNCITRAL Model Law nor the EC Regulation addresses the need for cooperation with respect to enterprise groups, where those obligations need to be more broadly applicable and the distinction between main and non-main proceedings is not relevant, except as it applies to multiple proceedings concerning an individual group member.

1. Communication by courts

(a) General considerations

15. Both the Guide to Enactment of the UNCITRAL Model Law⁵³ and the UNCITRAL Practice Guide⁵⁴ point to the desirability of enabling courts in cross-border insolvency proceedings to communicate directly with foreign courts and insolvency representatives in order to avoid the use of the traditional, time-consuming procedures, such as letters rogatory or other diplomatic or consular channels and communications via higher courts. This ability is critical when the courts consider they should act with urgency to avoid potential conflicts or preserve value or the issues to be considered are time-sensitive. That ability to communicate should include the ability to initiate communication, by requesting information or assistance from foreign courts and insolvency representatives, as well as the ability to receive and process such requests from abroad. It is desirable that communication not be dependent upon the formal recognition of foreign proceedings, thus enabling communication to take place before, or irrespective of whether, an application for recognition is made.

16. The different approaches taken to communication between the courts and parties serve to illustrate some of the problems that might be encountered when seeking to promote cross-border cooperation. In addition to the question of whether there is specific authorization for communication between courts, there is very often hesitance or reluctance on the part of courts of different jurisdictions to communicate directly with each other. That hesitance or reluctance may be based upon ethical considerations; legal culture; language; or lack of familiarity with foreign laws and their implementation. They may also relate to concerns about the implications of communication for judicial independence and impartial decision-making. Some States have a relatively liberal approach to communication between judges, while in other States judges may not communicate directly with parties or insolvency representatives or indeed with other judges, as such communication may give rise to constitutional issues. In some States, *ex parte* communications with the judge are considered normal and necessary, while in other States such communications would not be acceptable. Within States, judges and legal

⁵³ Id., paras. 178-179.

⁵⁴ UNCITRAL Practice Guide, chap. II, paras. 4-10 and chap. III, 146-181.

practitioners may have quite different views about the propriety of contacts between judges without the knowledge or participation of the legal representatives for the parties. Some judges, for example, accept that there is no difficulty with private contact amongst them, while some legal practitioners would strongly disagree with that practice. Courts typically focus on the matters before them and, as noted above, may be reluctant to provide assistance to related proceedings in other States, particularly when the proceedings for which they are responsible do not appear to involve an international element in the form of a foreign debtor, foreign creditors or foreign operations.

17. A further issue of relevance to facilitating cooperation between insolvency proceedings affecting group members might be the ability or willingness of courts to take a global view of the business of the debtor and note what is occurring in insolvency proceedings in other jurisdictions concerning the same debtor or other members of the same group. This may be of particular importance where what occurs in those other jurisdictions is likely to have a domestic impact (e.g. with respect to local employees and other social policy issues). Whilst it would not change the powers the courts have under domestic law, knowledge of or about the foreign proceedings might nevertheless affect the court's approach to local proceedings and its willingness to coordinate them with the foreign proceedings. The challenge, however, is for the court to obtain the information about an enterprise group's global operations and concurrent insolvency proceedings that would be necessary to facilitate coordination, especially where that involves gaining access to information and records that are part of insolvency proceedings in other jurisdictions concerning different debtors, albeit members of the same enterprise group. The first aspect is thus gaining access to relevant information. The second is making it available to the court in local proceedings. One approach might be to permit appropriate documentary evidence to be provided or a foreign practitioner or insolvency representative of related group members to appear in the local court. Notwithstanding the practical difficulties, it is desirable that a court be able to take note of foreign proceedings that might affect local proceedings concerning the same group, particularly where a global solution for the enterprise group is being sought.

18. Establishing communication in cross-border cases involving enterprise groups may facilitate cross-border proceedings in many ways. For instance, it may assist parties to better understand the implications or application of foreign law, particularly the differences or overlaps that may otherwise lead to litigation; advance resolution of issues through a negotiated result acceptable to all; and provoke more reliable responses from parties, avoiding inherent bias and adversarial distortion that may be apparent where parties represent their own particular concerns in their own jurisdictions. It may also serve international interests by creating better understanding that will encourage international business and preserving value that would otherwise be lost through fragmented judicial action. Some of the potential benefits may be hard to identify at the outset, but may become apparent once the parties have communicated. Cross-border communication may reveal, for example, some fact or procedure that will substantially inform the best resolution of the case and may, in the longer term, serve as an impetus to law reform.

19. Communication between judges or other interested parties should follow proper procedures in order to ensure the communication is transparent, effective and

credible. At a general level, it might be appropriate to consider whether communication should be treated as a matter of course or as a last resort; whether a judge may advocate that a particular course of action be taken; and, with respect to the conditions that might apply to communication, such as those mentioned below, whether they should apply in all cases or whether there might be exceptions. While courts should be given broad discretion in carrying out their communications with foreign counterparts, they should not be required to engage in communications they consider inappropriate in the circumstances of a particular case. A further issue relates to the subject matter of the communication, and in particular whether communication could address only matters of procedure or also matters of substance. Some judges take the view that they could discuss case management issues, issues of timing, use of cross-border agreements and identifying which court might resolve which issue, but not substantive issues that touch upon the merits of the case.

(b) Means of communication

20. Information may be communicated in several ways, such as by exchange of documents (e.g. copies of formal orders, judgements, opinions, reasons for decisions, transcripts of proceedings, affidavits and other evidence) or orally. The means of communication may be post, fax or e-mail or other electronic means, or telephone or videoconference, depending upon what is available and affordable in the States involved in the communication and what is appropriate or required in each case. Copies of written communications may also be provided to the parties in accordance with applicable notice provisions. Communication may be effected directly between judges or between or through court officials (or a court-appointed intermediary) or insolvency representatives, subject to local rules. The development of new communication technologies supports various aspects of cooperation and coordination, with the potential to reduce delays and, as appropriate, facilitate face-to-face contact. As global litigation multiplies, these methods of direct communication are increasingly being used. Videoconferences, for example, have been used in a number of cases in preference to telephone conferences, as they provide reasonable control of the process and facilitate disciplined organization of the communication as the participants can hear and see each other, an aspect that is central to court proceedings generally. However, since these technologies are not available to all courts, it is desirable that the focus be upon how the communication might be facilitated to suit the needs of the particular case, rather than upon the use of any particular technology.

(c) Establishing rules or procedures for court-to-court communication

21. In any particular case it will be desirable to determine, as appropriate to the relevant jurisdictions and in accordance with applicable law, procedures to govern court-to-court communication to balance the interests of the different parties in interest and ensure that no one is prejudiced in any material way. The procedures might address: the parties to be notified of the proposed communication (e.g. all parties in interest and their legal representatives); the persons permitted to participate in the communication and any limitations that will apply; the questions to be considered; whether the parties share the same intentions or understanding with respect to communication; organization and timing of the communication; recording of the communication; any safeguards that will apply to protect the

substantive and procedural rights of the parties; the language of the communication and any consequent need for translation of written documents or interpretation of oral communications (and who should bear the administrative costs); acceptable methods of communication; handling of objections to the proposed communication; and questions of confidentiality and transparency.

22. Courts may adopt guidelines, such as the Court-to-Court Guidelines,⁵⁵ to address some of these issues. These guidelines typically are intended to promote transparent communication between courts, permitting courts of different jurisdictions to communicate with one another, without changing the applicable domestic rules or procedures or affecting or curtailing the substantive rights of any party in proceedings before the courts.

(i) Time, place and manner of communication

23. Generally, it is desirable that communications proceed at a time and place and in a manner mutually determined between the courts, the insolvency representatives and other parties in interest, as applicable. These arrangements need not necessarily be made by the judges directly, but might involve relevant court officials.

(ii) Notice of proposed communication

24. In insolvency proceedings involving multinational enterprise groups, a balance needs to be struck between facilitating the communication in a practical and convenient manner and protecting the integrity of the communication by ensuring an open and transparent process. Various parties may be affected by communications between courts, and it may often be difficult, if not impractical, to ascertain the identity of all of those parties, including, for example, the creditors. Moreover, the jurisdictions involved may operate under different rules regarding the provision of notice, affecting issues of timing and the identity of recipients (i.e. not all parties in interest may be entitled to notice of certain issues). A key question will therefore concern the parties to be notified of any proposed communication in accordance with applicable law and the extent to which the requirements of the different laws can be coordinated. The absence of clear rules on how this issue should be approached has the potential to cause delay and erosion of value, especially where the communication is required to resolve or avoid conflicts or to address the coordination of particular issues, such as sale of assets or submission and verification of claims.

25. Provision of notice generally might be assisted by cooperation between the various courts to develop a list of parties requiring notification, which may include parties that are entitled to notice of any court business related to the insolvency proceedings, including communication.⁵⁶ Coordination of the provision of notice may be managed through an electronic system or a website, which could facilitate tracking of the changing identity of those persons entitled to notice in many insolvency proceedings, resulting from, for example, assignment or trading of claims; minimizing the costs associated with provision of notice; and the differences

⁵⁵ Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, published by the American Law Institute (16 May 2000) and adopted by the International Insolvency Institute (10 June 2001), available online at <http://www.ali.org/doc/Guidelines.pdf>.

⁵⁶ See Court-to-Court Communication Guideline 12.

in the laws applicable to the provision of notice being taken into account. It would also, however, have to taken into consideration possible language, access, and confidentiality issues.

(iii) Right to participate

26. To ensure the credibility of the communication and the parties directly involved in it, as well as fairness and transparency, it is desirable that communications proceed in a manner that is open to participation by relevant parties, rather than *ex parte*.

27. As noted above, however, there is a need to balance those requirements against the practicalities of organizing and conducting the communication. This may require participants to be limited to parties in interest. Although different standards may govern the issue of who may be considered a party in interest in the particular circumstances of the case or the communication in question, it might generally be assumed that key parties in interest would include the debtor (where it is a debtor in possession) or the insolvency representative and relevant legal representative. While the general principle might be that those particular parties in interest are entitled to participate, it may be desirable for the courts to have the right to determine, as required, who should participate in a specific case in order to ensure the process is manageable and effective.

(iv) Recording of the communication as part of the record of the proceedings

28. To further ensure the transparency of court-to-court communication, the insolvency law may permit any communication to be recorded and a transcript prepared. The transcript may be made part of the record of the proceedings and, as such, generally would be available at least to those participating in the communication and their legal representatives or, more widely, in accordance with the rules applicable to the availability of such court records.

(v) Confidentiality

29. In general, communications between courts involved in parallel insolvency proceedings related to members of a multinational group should be as transparent as possible to ensure fairness to the parties involved and avoid creating incentives for the parties to hedge against the possibility of an adverse outcome. It is desirable that information not be treated as confidential simply because the communication occurs in a cross-border context.

30. However, much of the information relating to the debtors and their affairs that needs to be considered and shared in insolvency proceedings involving multinational enterprise groups may be commercially sensitive, confidential, or subject to obligations owed to third persons (such as trade secrets, research and development information, and customer information). Such information may be especially sensitive in the case of a debtor in reorganization proceedings where it's continued ability to operate in the market and the protection of value may require confidentiality. Accordingly, the use of such information may need to be carefully considered and disclosure appropriately restricted to prevent third parties from taking unfair advantage of it.

31. The jurisdictions involved in insolvency proceedings relating to multinational enterprise group members may have different substantive rules regarding confidentiality and the release of information to parties. Those differences would need to be taken into account when considering cross-border communications and how they will be conducted and recorded, permitting the courts to reach agreement on the protections necessary to comply with applicable law.

32. Confidentiality of information may also be addressed in a cross-border insolvency agreement,⁵⁷ which can establish requirements for access to that information, including the use of confidentiality agreements.

(vi) Costs of communication

33. The issue of costs of the communication may be a consideration, especially where many parties are affected and a means of communication is used that entails, in some States, relatively high costs, such as videoconferencing. Moreover, the use of multiple languages may complicate communication, with cost implications where translation of documents and interpretation of oral communication are required. It will be important to determine how the costs are to be borne by, or apportioned between, the relevant insolvency proceedings. If reimbursement of the costs of certain parties is involved, it should be clear how, and the currency in which, that will occur.

(vii) Effect of communication

34. Where a court communicates with a foreign court in the context of cross-border insolvency proceedings, the insolvency law should make it clear that the mere fact of communication having taken place would not imply a substantive effect on the authority or powers of the court, the matters before it, its orders, or the rights and claims of parties participating in the communication. Such a proviso reassures the parties that the communication between the authorities involved in the insolvency proceedings will not jeopardize their rights or affect the authority and independence of the court before which they are appearing. It is likely to reduce the likelihood of objections to planned communication and furnish the courts and their representatives with greater flexibility in their cooperation with each other. Such a proviso may also ensure that courts and their representatives do not operate beyond the limits of their authority in engaging in communication with their counterparts in different jurisdictions. Notwithstanding such a proviso, it should be possible for the courts to explicitly reach agreement on a range of matters, including approval of a cross-border insolvency agreement.

2. Coordination of the debtor's assets and affairs

35. The conduct of cross-border insolvency proceedings concerning enterprise groups will often require assets of the different insolvency estates to continue to be used, realized or disposed of in the course of the proceedings. Coordination of such use, realization and disposal will help to avoid disputes and ensure that the benefit of all parties in interest is the key focus, particularly in reorganization. For example,

⁵⁷ See UNCITRAL Practice Guide, III.B, paras. 168-171; see also above, part two, chap. III, paras. 28, 52 and 115 and recommendation 111 on obligations of confidentiality in insolvency proceedings.

one member of an enterprise group may serve as the exclusive supplier of another group member or have exclusive control over a key resource used by another member, so that insolvency proceedings with respect to one of those members might have profound consequences on the continuing operation of the entire group. Coordinating the debtor's assets and affairs may involve both the courts and the insolvency representatives. Some matters may require specific approval by the courts, while others may be addressed by agreement between the insolvency representatives.

36. Some of the issues to be considered in facilitating this coordination may include: the location of the various assets and identification of the jurisdiction to which they are subject; determination of the law governing the assets and the parties responsible for determining how they can be used or disposed of (e.g. the insolvency representative, the courts or in some cases the debtor), including the approvals required; the extent to which responsibility for those assets can be shared among or allocated to different parties in different States; how information concerning the affairs of different debtors in different jurisdictions can be obtained and shared to ensure coordination and cooperation; and the sequence in which proceedings should evolve. Coordination may be relevant to investigating the debtor's assets, considering possible avoidance proceedings, and restricting the debtor's ability to move assets to locations beyond the reach of the court or insolvency representative. It may also require the courts to identify the optimal forum for addressing a particular issue, such as sale or disposal of a certain asset, and defer to that forum to the extent permitted by law.⁵⁸

3. Appointment of a court representative

37. Such a person may be appointed by a court to facilitate coordination of insolvency proceedings concerning enterprise group members taking place in different jurisdictions. The person may have a variety of possible functions as directed by the courts, but should not be regarded as an additional insolvency representative or as a substitute for an existing insolvency representative. Their potential functions might include: acting as a go-between for the courts and the insolvency representatives involved, especially where issues of language are raised; developing a cross-border insolvency agreement in consultation with the relevant parties; promoting consensual resolution of issues between the parties; facilitating the flow of information between the different proceedings; and ensuring that notice with respect to certain business before the courts is given to all parties in interest (e.g. other members of the enterprise group, creditors, and foreign courts or insolvency representatives). The appointing court may consider the qualifications required to perform the functions to be undertaken, as well as issues of conflict and will typically outline the terms under which the appointee is authorized to act and the extent of its powers. They may be appointed for a specific purpose, such as the negotiation of a cross-border insolvency agreement or more generally to carry out a range of the functions noted above. The person may be required to report to the court or courts involved in the proceedings on a regular basis, as well as to the parties.

⁵⁸ Allocation of responsibility for certain actions between the different courts is discussed in the UNCITRAL Practice Guide, chap. II, paras. 18-20; chap. III, paras. 59-74.

4. Coordination of hearings

38. Hearings that might variously be described as joint, simultaneous or coordinated (“coordinated hearings”)⁵⁹ can significantly promote the efficiency of parallel insolvency proceedings involving members of a multinational enterprise group by bringing relevant parties in interest together at the same time to share information and discuss and resolve outstanding issues or potential conflicts, thus avoiding protracted negotiations and resulting time delays. What needs to be emphasized with respect to such hearings, however, is that each court should reach its own decision independently and without influence from the other court. While such hearings may be relatively convenient to organize in a domestic setting to ensure coordination of proceedings with respect to different group members, they can be logistically very complicated to organize in an international setting, involving as they may different languages, time zones, laws, procedures and judicial traditions. They may result in a deadlock if, for example, the competencies of the authorities engaged in the hearing are not precisely agreed or established.

39. Although they are potentially difficult to organize, such hearings have been used between some States that share a common language, legal tradition and similar time zones and have led to the successful resolution of difficult issues to the benefit of all parties concerned.⁶⁰ Such hearings might be more widely used in the future, with the assistance of appropriate procedures and safeguards to assist careful planning and avoid complications. Those rules of procedure might address, for example, use of pre-hearing conferences; conduct of the hearings, including the language to be used and need for interpretation; requirements for the provision of notice; methods of communication to be used so that the courts can simultaneously hear each other; conditions applicable to the right to appear and be heard; documents that may be submitted; the courts to which participants may make submissions; the manner of submission of documents to the court and their availability to other courts; questions of confidentiality; limitations on the jurisdiction of each court to the parties appearing before it;⁶¹ and rendering of decisions.

40. Some guidelines and agreements dealing with these types of hearings provide that in order to best plan for orderly administration, the courts, their appointees or the insolvency representatives should communicate with their foreign counterparts in advance of the hearing to establish guidelines related to all procedural, administrative and preliminary matters. Once a hearing has been concluded, the relevant authorities may further communicate to assess the contents of the hearing, discuss next steps (including additional hearings), develop or modify guidelines for future hearings, consider whether issuing joint orders would be feasible or

⁵⁹ These types of hearings are discussed in the UNCITRAL Practice Guide, chap. III, paras. 154-159.

⁶⁰ See for example, the cases of *Quebecor World Inc.*, Montreal Superior Court, Commercial Division, (Canada) No. 500-11-032338-085 and the United States Bankruptcy Court for the Southern District of New York, No. 08-10152 (2008) and *Solv-Ex Canada Limited and Solv-Ex Corporation*, Alberta Court of Queen’s Bench, Case No. 9701-10022 (28 January 1998), and the United States Bankruptcy Court for the District of New Mexico, Case No. 11-97-14362-MA (28 January 1998); further details of these cases are provided in the UNCITRAL Practice Guide, Annex I.

⁶¹ Cf. UNCITRAL Model Law, article 10.

warranted and determine how certain procedural issues that were raised in the hearing should be resolved.⁶²

Recommendations 240-245

Purpose of legislative provisions

The purpose of legislative provisions on cooperation involving courts in the context of multinational enterprise groups is:

(a) To authorize and facilitate cooperation between the courts seized of insolvency proceedings relating to different members of an enterprise group in different States;

(b) To authorize and facilitate cooperation between the courts and the insolvency representatives appointed to administer those different proceedings; and

(c) To facilitate and promote the use of various forms of cooperation to coordinate insolvency proceedings with respect to different enterprise group members in different States and establish the conditions and safeguards that should apply to those forms of cooperation to protect the substantive and procedural rights of parties and the authority and independence of the courts.

Contents of legislative provisions⁶³

Cooperation between the court and foreign courts or foreign representatives

240. The insolvency law should permit the court that is competent with respect to insolvency proceedings concerning an enterprise group member to cooperate to the maximum extent possible with foreign courts or foreign representatives,⁶⁴ either directly or through the insolvency representative or other person appointed to act at the direction of the court, to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of the same enterprise group.

Cooperation to the maximum extent possible involving courts (para. 14)

241. The insolvency law should specify that cooperation to the maximum extent possible between the court and foreign courts or foreign representatives be implemented by any appropriate means, including for example:

(a) Communication of information by any means considered appropriate by the court, including provision to the foreign court or the foreign representative of copies of documents issued by the court or that have been or are to be filed with the court concerning the enterprise group members subject to insolvency proceedings or participation in communications with the foreign court or foreign representative;

⁶² See also UNCITRAL Practice Guide, chap. II, para. 15 and chap. III; Court-to-Court Communication Guideline 9 (e).

⁶³ These recommendations on cooperation are intended to be permissive, not directive and are consistent with the corresponding articles of the Model Law, articles 25.1 and 26.1.

⁶⁴ Defined in article 2(d) of the Model Law to mean “a person or body, including one appointed on an interim basis, authorized on a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.”

(b) Coordination of the administration and supervision of the affairs of the enterprise group members subject to insolvency proceedings;

(c) Appointment of a person or body to act at the direction of the court; and

(d) Approval or implementation of agreements concerning coordination of insolvency proceedings in accordance with recommendation 254.

*Direct communication between the court and foreign courts or foreign representatives*⁶⁵ (paras. 15-20)

242. The insolvency law should permit the court that is competent with respect to insolvency proceedings concerning an enterprise group member to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives concerning those proceedings and insolvency proceedings commenced in other States with respect to members of the same enterprise group to facilitate coordination of those proceedings.

Conditions applicable to cross-border communication involving courts (paras. 21-33)

243. The insolvency law should specify that communication between the courts and between courts and foreign representatives should be subject to the following conditions:

(a) The time, place and manner of communication should be determined between the courts or between the courts and foreign representatives;

(b) Notice of any proposed communication should be provided to parties in interest in accordance with applicable law;

(c) An insolvency representative should be entitled to participate in person in a communication. A party in interest may participate in a communication in accordance with applicable law and when determined by the court to be appropriate;

(d) The communication may be recorded and a written transcript prepared as directed by the courts. That transcript may be treated as an official transcript of the communication and filed as part of the record of the proceedings;

(e) Communications should only be treated as confidential in exceptional cases to the extent considered appropriate by the courts and in accordance with applicable law; and

(f) Communication should respect the mandatory rules of the jurisdictions involved in the communication, as well as the substantive and procedural rights of parties in interest, in particular the confidentiality of information.

Effect of communication (para. 34)

244. The insolvency law should specify that communication involving the courts shall not imply:

⁶⁵ See UNCITRAL Model Law, articles 25.2 and 26.2.

- (a) A compromise or waiver by the court of any powers, responsibilities or authority;
- (b) A substantive determination of any matter before the court;
- (c) A waiver by any of the parties of any of their substantive or procedural rights; or
- (d) A diminution of the effect of any of the orders made by the court.

Coordination of hearings (paras. 38-40)

245. The insolvency law may permit the court to conduct a hearing in coordination with a foreign court. Where hearings are coordinated, they may be subject to certain conditions to safeguard the substantive and procedural rights of parties and the jurisdiction of each court. Those conditions might address the rules applicable to the conduct of the hearing; the requirements for the provision of notice; the method of communication to be used; the conditions applicable to the right to appear and be heard; the manner of submission of documents to the court and their availability to a foreign court; and limitation of the jurisdiction of each court to the parties appearing before it.⁶⁶ Notwithstanding the coordination of hearings, each court remains responsible for reaching its own decision on the matters before it.

D. Forms of cooperation involving insolvency representatives

1. Promoting cooperation

41. As noted above (see part two, chap. III, paras. 35 and following), the insolvency representative plays a central role in the effective and efficient implementation of the insolvency law, with day-to-day responsibility for administration of the insolvency estate of the debtor. As such, the insolvency representatives will play a key role in ensuring the successful coordination of multiple proceedings concerning enterprise group members through working with each other and the courts concerned. In order to fulfil that role, the insolvency representative, like the court, will need to have appropriate authorization to undertake the necessary tasks of, for example, sharing information, coordinating day-to-day administration and supervision of the debtors' affairs, negotiating cross-border insolvency agreements and so forth.

42. As noted above, such arrangements for cooperation and coordination cannot diminish or remove an insolvency representative's obligations under the law governing its appointment

⁶⁶ See also UNCITRAL Model Law, article 10.

Recommendations 246-250

Purpose of legislative provisions

The purpose of legislative provisions on cooperation between insolvency representatives and between insolvency representatives and foreign courts in the context of multinational enterprise groups is:

(a) To authorize and facilitate cooperation between insolvency representatives appointed to administer insolvency proceedings relating to different members of an enterprise group in different States; and

(b) To facilitate and promote the use of various forms of cooperation between those insolvency representatives and establish the conditions and safeguards that should apply to those forms of cooperation to protect the substantive and procedural rights of parties.

Contents of legislative provisions

Cooperation between the insolvency representative and foreign courts

246. The insolvency law should permit the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign courts to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of the same enterprise group.

Cooperation between insolvency representatives

247. The insolvency law should permit the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign representatives⁶⁷ appointed to administer insolvency proceedings commenced in other States with respect to members of the same enterprise group in order to facilitate coordination of those proceedings.

Communication between the insolvency representative and foreign courts

248. The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts concerning those proceedings and insolvency proceedings commenced in other States with respect to members of the same enterprise group to facilitate coordination of those proceedings.

⁶⁷ See footnote to recommendation 240 (article 2(d) of the UNCITRAL Model Law) with respect to the definition of a foreign representative, which would include an insolvency representative appointed on an interim basis.

Communication between insolvency representatives

249. The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign representatives appointed to administer insolvency proceedings commenced in other States with respect to members of the same enterprise group concerning those proceedings to facilitate coordination of those proceedings.

Cooperation to the maximum extent possible between insolvency representatives

250. The insolvency law should specify that cooperation to the maximum extent possible between insolvency representatives be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning the enterprise group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information;

(b) Use of cross-border insolvency agreements in accordance with recommendation 253;⁶⁸

(c) Allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating role;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members subject to insolvency proceedings, including day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; use of avoidance powers; communication with creditors and meetings of creditors; submission and admission of claims, including intra-group claims; and distributions to creditors; and

(e) Coordination with respect to proposal and negotiation of coordinated reorganization plans.

2. Appointment of a single or the same insolvency representative

43. The issue of promoting coordination may also be approached via the appointment of the insolvency representative, by considering, for example, the appointment of the same or a single insolvency representative in multiple insolvency proceedings affecting members of the same group in different States, where that person (whether natural or legal) met applicable local requirements (see chap. II, paras. 139-145 with respect to domestic proceedings). In addition to the benefits that such an appointment might bring to multiple domestic proceedings, in the international context it has the potential to greatly facilitate cooperation between the different proceedings and reorganization of the group as a whole.

44. As noted above with respect to the domestic context, in deciding whether it would be appropriate to appoint a single or the same insolvency representative, the nature of the group, including the level of integration of its members and its

⁶⁸ See the UNCITRAL Practice Guide, which compiles practice with respect to the use and negotiation of these agreements, including a discussion of the issues typically addressed.

business structure, would need to be considered. In addition, it is highly desirable that any person to be appointed in that capacity have the appropriate experience and knowledge (see part two, chap. III, para. 39) of international insolvency matters and that that knowledge and experience be carefully scrutinized before the appointment is made to ensure it is appropriate to the particular group members concerned and the business they conduct. It is desirable that a single or the same insolvency representative only be appointed to administer two or more group members where it will be in the interests of the insolvency proceedings to do so.

45. Where such a person could be appointed, they would be subject to the local law of the States in which they were appointed, in particular as regards qualification, licensing (where applicable), powers and duties and supervision by the court. Accordingly, the insolvency representative would be subject to the same local requirements as any insolvency representative appointed in one of those States.

46. The appointment could be of a natural person qualified to act in different States or a legal person, where that legal person employed or had as its members appropriately qualified persons who could serve as insolvency representatives in a number of different States (see part two, chap. III, paras. 36-47 dealing with appointment of the insolvency representative, including qualifications, as well as para. (v) of the main glossary). Although the availability of those qualified persons might generally be limited, there may be regions where it is more common or the globalization of trade and services makes it increasingly feasible.

47. Where such an approach is adopted, provisions to avoid potential conflicts of interest may need to be considered. Such a conflict of interest might arise when the group members represented by a single insolvency representative had different interests in a particular issue, for example, post-commencement finance or the verification and admission of claims, especially intra-group claims, or when the obligations of the insolvency representative under different insolvency laws were directly in conflict. Those cases might be addressed in the same manner as indicated above with respect to appointment of a single or the same insolvency representative in the domestic context (see above, chap. II, para. 144 and recommendation 233).

Recommendations 251-252

Purpose of legislative provisions

The purpose of legislative provisions on appointment of the insolvency representative in the context of multinational enterprise groups is, in the interests of promoting efficient and effective administration of insolvency proceedings with respect to members of the same enterprise group in different States,

(a) To authorize, where the court determines it to be in the best interests of the relevant insolvency proceedings, the appointment of a single or the same insolvency representative to administer multiple proceedings; and

(b) To address any conflicts of interest that might arise where a single or the same insolvency representative is appointed.

Contents of legislative provisions

Appointment of a single or the same insolvency representative (paras. 43-46)

251. The insolvency law should permit the court, in appropriate cases, to coordinate with foreign courts with respect to the appointment of a single or the same insolvency representative to administer insolvency proceedings concerning members of the same enterprise group in different States, provided that the insolvency representative is qualified to be appointed in each of the relevant States. To the extent required by applicable law, the insolvency representative would be subject to the supervision of each of the appointing courts.

Conflict of interest (para. 47)

252. The insolvency law should specify measures to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members in different States. Such measures may include the appointment of one or more additional insolvency representatives.

E. Use of cross-border insolvency agreements⁶⁹

48. The insolvency community, faced with the daily necessity of dealing with insolvency cases and attempting to coordinate administration of cross-border insolvencies in the absence of widespread adoption of facilitating national or international laws, has developed cross-border insolvency agreements. These agreements are discussed in detail in the UNCITRAL Practice Guide. They are designed to address issues arising in cross-border cases, facilitating their resolution through cooperation between the courts, the debtor, and other parties in interest across jurisdictional lines to work efficiently, and increase realizations for creditors in potentially competing jurisdictions. Their use can effectively reduce the cost of litigation and enable parties to focus on the conduct of the insolvency proceedings, rather than upon resolving conflict-of-laws and other such disputes. Moreover, in addition to clarifying parties' expectations, these agreements can assist with preservation of the debtor's assets and maximization of value. In the practice to date, these agreements have typically been approved by the courts, but they might also be approved by creditors or creditor committees or operate as contractual arrangements between the signatories.⁷⁰

49. Cross-border insolvency agreements are generally entered into for the purpose of facilitating international cooperation and coordination of multiple insolvency proceedings in different States. Typically, they are designed to assist in the management of those proceedings and are intended to reflect the harmonization of procedural rather than substantive issues between the jurisdictions involved (although in limited circumstances, substantive issues may also be addressed). They vary in form (written versus oral) and scope (generic to specific) and may be entered into by different parties. Simple generic agreements may emphasize the

⁶⁹ For a detailed discussion of cross-border insolvency agreements, see the UNCITRAL Practice Guide.

⁷⁰ Id., chap. III, paras. 31-33.

need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements establish a framework of principles to govern multiple insolvency proceedings.

50. They can be regarded as contracts between the signatories or, in case of approval by the court, may obtain the legal status of a court order. Agreements may cover one or more matters and nothing prevents parties from concluding several agreements as proceedings progress to address different issues that arise. It is not uncommon, for example, to have agreements addressing general communication and cooperation at the start of insolvency proceedings, followed by specific agreements on claims procedures at a later point. The conclusion of a cross-border insolvency agreement is thus not limited to a certain time period, such as before the commencement of proceedings. While it is certainly preferable at an early stage of the proceedings in order to address expectations and provide clarity, an agreement may be concluded at a later stage, when particular issues arise that indicate a need for cooperation. Existing agreements may also be modified, subject to any requirements of the agreement regarding modification.

51. As noted above, cross-border insolvency agreements may include only general principles on how cooperation and coordination should be handled, or also address specific issues, depending upon the needs of the particular case and the issues to be resolved. Issues typically addressed include some or all of the following:

- (a) Allocation of responsibility for various aspects of the conduct and administration of the proceedings between the different courts involved and between insolvency representatives, including limitations on authority to act without the approval of the other courts or insolvency representatives;
- (b) Availability and coordination of relief;
- (c) Coordination of recovery of assets for the benefit of creditors generally, in case claims for assets of a group member subject to bankruptcy proceedings in a different State are raised;
- (d) Submission and treatment of claims;
- (e) Use and disposal of assets;
- (f) Methods of communication, including language, frequency and means;
- (g) Provision of notice;
- (h) Coordination and harmonization of reorganization plans;
- (i) Issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution;
- (j) Administration of proceedings, in particular with respect to stays of proceedings or agreement between the parties not to take certain legal actions;
- (k) Choice of applicable law with respect to overlapping issues;
- (l) Allocation of responsibilities between the parties to the agreement;
- (m) Costs and fees; and
- (n) Safeguards.

52. The safeguards included typically relate to ensuring that nothing in the agreement derogates from court independence and authority, public policy and applicable law, particularly with respect to any obligations undertaken by the insolvency representative or parties, including the debtor.

53. These agreements are increasingly common, especially in certain States, and have been successfully employed in different situations, such as concurrent reorganization and liquidation proceedings in different States; main and non-main proceedings as defined by the UNCITRAL Model Law; and concurrent insolvency and non-insolvency proceedings in different States. It should be noted, however, that while the insolvency law of certain States may permit courts to approve cross-border agreements regarding the same debtor (for example, through provisions analogous to article 27 of the Model Law), that authorisation may not necessarily extend to the use of such agreements in the group context. What might be required to facilitate global resolution of a group's financial difficulties (be it global reorganization or a combination of different procedures) is an agreement to coordinate multiple proceedings with respect to different debtors in different States, albeit members of the same group. Many laws may lack the provisions necessary to enable a court to approve or recognize an agreement relating not only to debtors subject to its jurisdiction but also to debtors that are not, even if they are members of the same enterprise group.

54. It is desirable, therefore, that in order to enhance cross-border cooperation, an insolvency law should authorize the relevant parties — insolvency representatives and other parties in interest — to conclude cross-border insolvency agreements concerning different group members in different States and permit the courts to approve or implement them, taking into consideration the group context. It should be noted that different States may have different form requirements that will have to be observed in order for these agreements to be effective in the relevant jurisdictions.

Recommendations 253-254

Purpose of legislative provisions

The purpose of legislative provisions with respect to cross-border insolvency agreements is to ensure that the insolvency law:

(a) Permits the use of such agreements to facilitate cooperation with respect to insolvency proceedings in different States concerning members of the same enterprise group; and

(b) Authorizes the approval of such agreements by the court, as appropriate.

Contents of legislative provisions

Authority to enter into cross-border insolvency agreements (paras. 48, 50, 53-54)

253. The insolvency law should permit the insolvency representative and other parties in interest to enter into a cross-border insolvency agreement involving two or more members of an enterprise group in different States to facilitate coordination of insolvency proceedings with respect to those group members.

Approval or implementation of cross-border insolvency agreements (paras. 53-54)

254. The insolvency law should permit the court to approve or implement a cross-border insolvency agreement involving two or more members of an enterprise group in different States to facilitate coordination of the insolvency proceedings with respect to those enterprise group members.

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