Corporate Groups: Bringing Insolvency Law and Corporate Law Together

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Corporate groups are an ensemble of companies that act in concert. From an economic perspective, they represent one enterprise and an efficient administration of insolvency proceedings related to companies belonging to the same group. Treating them as one could possibly minimize costs and loss of time, minimize losses for creditors, employers and shareholders, and maximize the groups' value if the group could still be treated as one enterprise. Unfortunately, national insolvency laws applicable in the EU as well as international proposals are based on the central principle of insolvency law, generally being the principle of the 5 one's: one insolvent debtor, one estate, one insolvency proceeding, one court and one insolvency office holder. How to bring these 5 one's in line with economic reality?

On a European level the Insolvency Regulation (Recast), since June 2017, contains rules on insolvent corporate groups which means that any amendment requires the European lawmaker to act. In a future revision of the Regulation, but also when implementing national rules for insolvent corporate groups, the following step by step approach is recommended. These steps relate to (1) communication and cooperation between proceedings, (2) procedural consolidation, and (3) substantial consolidation.

First, the European and national legislators should ensure that insolvency practitioners and courts are guided by the principles and guidelines set out in the Communication and Cooperation Guidelines for Cross-Border Insolvency Guidelines of 2007 (CoCo Guidelines), the EU Cross-Border Insolvency Court-to-Court Cooperation Principles of 2015 (EU JudgeCo Principles), which include EU Cross-Border Insolvency Court-to-Court Communications Guidelines (EU JudgeCo Guidelines). Communication and cooperation may take any form, including the conclusion of protocols. Such a protocol should include clauses regarding notices, the right of insolvency practitioners, creditors or other stakeholders to appear, access to data and information among insolvency practitioners, communication among committees, asset preservation, claim including specific rules for intercompany claims, submission of a restructuring plan of a liquidation plan, amendment of the protocol and the incorporation of the CoCo Guidelines, the EU JudgeCo Principles and EU JudgeCo Guidelines by reference and form part of this protocol in whatever form they are formally adopted by each court, in whole or in part and with or without modifications, if any, with the addition of a clause providing that where there is any discrepancy between the protocol and these principles and guidelines the protocol shall prevail. In addition, the European and national legislators should mandate courts and insolvency practitioners to communicate and cooperate in international cases that do not fall under the application of the Insolvency Regulation (Recast) providing rules analogous to the CoCo Guidelines, the EU JudgeCo Principles and EU JudgeCo Guidelines. The fact the Insolvency Regulation (Recast) does not apply should not preclude insolvency practitioners and courts in relevant third country jurisdiction from communicating and cooperating with their respective counterparts to the extent that such communication or cooperation is compatible with the national laws of any such third country jurisdiction. Finally, the European and national legislators should ensure the efficiency of group coordination proceedings under the Insolvency Regulation (recast). For the (non-binding) documents mentioned, see http://www.tri-leiden.eu/.

Second, Member States should enable their courts to jointly open insolvency proceedings for several companies belonging to the same group if the court finds that the centre of main interests (COMI) of

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those companies is located in their Member State (recommendation 9.05). Support should be given to a provision that allows the court located in the COMI (COMI court) of a member participating in group coordination proceedings may authorize the insolvency practitioner appointed to seek: (1) participation and to be heard in a coordinating proceeding taking place in another jurisdiction, (2) recognition by the coordinating court of the proceeding in the COMI jurisdiction, whilst (3) the coordinating court can receive such a request for recognition. The European and national legislators should ensure that, while participation in group coordination proceedings is voluntary in principle, the decision not to participate is required to exclude a member from the effects of such proceedings (opt-out). In addition, the COMI court should be allowed to overturn an opt-out of a group member whenever the decision to opt out is not adopted in good faith. Where a high percentage (minimum of 80%) of equally affected members participate in group coordination proceedings, the COMI court should assume that an opt-out was decided in bad faith unless good faith is proven to the court. Solvent members of a group should be allowed to formally participate in group coordination proceedings without such participation implying a submission to the jurisdiction of a court or to the applicability of its insolvency laws. Most importantly, the European and national legislators should ensure that group coordination proceedings can result in a group restructuring or insolvency plan that is binding for all participating members. Creditors and stakeholders of participating group members would be placed in separate classes and vote under the rules according to the applicable national law in their own jurisdiction. Following the vote of the group restructuring or insolvency plan by relevant creditors and stakeholders, each COMI court would confirm the plan if it holds that the plan was accepted according to national law including all its cramdown options. A cross jurisdictional (cross entity) cramdown, however, should not be possible. Finally, under this leg, the insolvency practitioner appointed in the group coordination proceedings (coordinator) should have the right of access to proceedings in each COMI court to be heard on issues related to implementation of the group restructuring plan.

Third, the European and national legislators should ensure that a court may approve the substantive consolidation of the estates of jointly administered members of the group or parts of these estates, where (1) the assets and liabilities of all of the respective members have been commingled in a sense that they cannot easily be untangled without severe effort, delays and costs, or (2) the group structure has been used to deceive creditors. They should also allow a group restructuring or insolvency plan to provide for such a form of consolidation in cross-border cases.[1] Only future can tell that with these incremental corporate law and insolvency law can amalgamate.

1 For explanation and context, *see* Bob Wessels & Stephan Madaus, *Instrument of the European Law Institute – Rescue of Business in Insolvency Law* (6 Sept. 2017). Available at SSRN: https://ssrn.com/abstract=3032309. Forthcoming in a book published by Oxford University Press.